

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Seventeenth Session
December 6 to 10, 2010, Geneva

REPORT

prepared by the Secretariat

INTRODUCTION

1. Convened by the Director General of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) held its seventeenth session in Geneva, from December 6 to 10, 2010.
2. The following States were represented: Algeria, Angola, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Georgia, Germany, Haiti, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Lithuania, Macedonia (the former Yugoslav Republic of), Malaysia, Mauritius, Mexico, Monaco, Morocco, Myanmar, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Turkey, United Arab Emirates, United Kingdom, United States of America, Venezuela (Bolivarian Republic of), Zambia and Zimbabwe (91). The European Union and its 27 Member States was also represented as a member of the Committee.
3. The following intergovernmental organizations (“IGOs”) took part as observers: African Intellectual Property Organization (OAPI), African Regional Intellectual Property Organization (ARIPO), African Union, Eurasian Patent Organization (EAPO), European Patent Office (EPO), Food and Agriculture Organization of the United Nations (FAO), International Union for the Protection of New Varieties of Plants (UPOV), Office of the High Commissioner for Human Rights (OHCHR), Organization of Eastern Caribbean States (OECS), Secretariat of the Convention on Biological Diversity (SCBD), South Centre, United Nations Environment Program (UNEP), United Nations Conference on Trade and Development (UNCTAD), and the World Trade Organization (WTO) (14).
4. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: American Folklore Society; American Intellectual Property Law Association (AIPLA); Assembly of First Nations (AFN); Call of the Earth; Civil Society Coalition (CSC); *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ)*; Congolese Association of Young Chefs and Gastrotechnie; Coordination of African Human Rights NGOs (CONGAF); CropLife International; Foundation for Aboriginal and Islander Research Action (FAIRA); Global Coalition for Biological and Cultural Diversity (of the International Society of Ethnobiology); Ibero-Latin-American Federation of Performers (FILAIE); Indian Council of South America (CISA); Indian Movement “*Tupaj Amaru*”; Indigenous Peoples (Bethchilokono) of Saint Lucia Governing Council (BGC); Instituto Indígena Brasileiro da Propriedade Intelectual (INBRAPI); International Association for the Protection of Intellectual Property (AIPPI); International Center for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Commission for the Rights of Aboriginal People (ICRA); International Council of Museums (ICOM); International Federation of Silk Producers Associations (FIAPF); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Association of the Phonographic Industry (IFPI); International Publishers Association (IPA); International Society for Ethnology and Folklore (SIEF); International Trademark Association (INTA); International Union for Conservation of Nature (IUCN); International Video Federation (IVF); Knowledge Ecology International (KEI); L’auravetl’an Information and Education Network of Indigenous People (LIENIP); League for Pastoral Peoples and Endogenous Livestock Development (LPP); Library Copyright Alliance; Mbororo Social Cultural Development Association (MBOSCUDA); Natural Justice; Nepal Indigenous Nationalities Preservation Association (NINPA); Nigeria Natural Medicine Development Agency (NNMDA); Research Group on Cultural Property (RGCP); Romani Baxt; The Assembly of Armenians of Western Armenia; Third World Network; Traditions for Tomorrow; the Tulalip Tribes of Washington Governmental Affairs Department (“the Tulalip Tribes”); Union for Ethical Bio Trade (UEBT); West Africa Coalition for Indigenous Peoples’ Rights (WACIPR); World Self-Medication Industry (WSMI) (46).

5. A list of participants is annexed to this report as Annex I.
6. Document WIPO/GRTKF/IC/17/INF/2 provided an overview of the documents distributed for the seventeenth session.
7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.
8. Mr. Wend Wendland of WIPO was Secretary to the seventeenth session of the Committee.

AGENDA ITEM 1: OPENING OF THE SESSION

9. The Chair, His Excellency Ambassador Philip Richard Owade, opened the session. He said he hoped to continue the journey that had commenced at the sixteenth session of the IGC in May 2010 (IGC 16), and wished that the same momentum would be maintained bearing in mind the timelines and expected results. He expressed confidence in there being a constructive working atmosphere based on the positive dynamism established at IGC 16 and at the First Intersessional Working Group (IWG 1) held in July 2010 addressing the issue of TCEs. In this respect, he thanked the Chair of IWG 1, Mrs. Savitri Suwansathit (Thailand) who had chaired the session with great success and her Vice Chairs, Mrs. Diabe Siby (Senegal), Mr. Norman Bowman (Australia), Ms. Vladia Borissova (Bulgaria) and Mr. Eduardo Tempone (Argentina). He urged the Committee to conduct substantive negotiations in an effective and timely manner. To this end, there would be no opening or general statements. He recalled that in September 2010, the WIPO General Assembly established a Development Agenda coordination mechanism whereby WIPO bodies report through the WIPO General Assembly to the Committee on Intellectual Property and Development (CDIP) on their implementation of the Development Agenda recommendations. In his view, this matter would be addressed fully at IGC 19 right before the next General Assembly. He also reminded the Committee that it had a tight schedule for next year, 2011, considering that two IWGs and two IGCs had to take place before the next General Assembly in September 2011. For this reason, the meetings had to take place between January and July 2011. Given the compressed program, Regional Coordinators had been consulted by the Secretariat in October 2010 and the schedule for 2011 had been agreed upon and made available. The Chair noted that the participation of indigenous and local communities was crucial to the credibility and quality of the negotiations. Therefore every possible effort would be made to allow their effective participation.
10. At the invitation of the Chair, the Director General, Mr. Francis Gurry, took the floor. He recalled that the Committee was in the middle of a biennium whose mandate had been fixed by the WIPO General Assembly. The Committee was required to undertake text-based negotiations and to submit to the General Assembly in September 2011 a text of an international legal instrument(s). Since the adoption of that mandate, the IGC had met on two occasions - in December 2009 and May 2010; and also held one session of the IWGs - IWG 1, which had taken place in July 2010. He joined in appreciating the very dynamic and constructive spirit in which the discussions had taken place at IWG 1. As a consequence, the Committee had document WIPO/GRTKF/IC/17/9, which reflected the outcome of IWG 1. He said that one of the major decisions of the week was how to address that document and the status to give it. In this regard, the Chair and the Vice Chairs of IWG 1 were thanked for their sterling work in ensuring such a positive outcome. He also took note of other working documents on the agenda, such as WIPO/GRTKF/IC/17/5, WIPO/GRTKF/IC/17/6, and WIPO/GRTKF/IC/17/7, including information documents commissioned at IGC 16, for example, WIPO/GRTKF/IC/17/INF/8 and WIPO/GRTKF/IC/17/INF/12. The Panel of Indigenous and Local Communities would be addressing the issue of the "public domain". Meetings of the IWGs on each of TK and GRs would take place in February of 2011. He hoped that the IGC would transmit to the IWGs the documents they wished the IWG to focus on, together with any questions or instructions. The time was very short to deliver on the mandate of the IGC. It was necessary that the approach of the IGC be structured and focused to reach the expected outcomes. The Director General referred to the

Voluntary Fund for Accredited Indigenous and Local Communities, which had very successfully funded representatives of indigenous and local communities to a number of IGC sessions and expressed his gratitude to the donors who had generously contributed to the Fund so far, notably, the Swedish Biodiversity Programme, France, the Christensen Fund, the Swiss Institute of Intellectual Property, South Africa and Norway. Unfortunately, the Fund was running short of funds and might not be able to cover the remaining IGC sessions taking place in May and July 2011 and, thus, a fundraising drive had been launched. Interested parties were invited to contact the Secretariat for further information. In conclusion, Mr. Gurry thanked the Chair for his time and valuable efforts.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

11. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/17/1 Prov. 1 for adoption and it was adopted.*

12. The Chair noted that the agenda did not include a reference to “Opening Statements” as this session was intended to continue negotiations in line with the Committee’s mandate and that many delegations had in the past indicated that opening statements were no longer appropriate. However, he invited any delegations which wished to submit written opening statements to do so and indicated that these would be reflected in the session’s report. A few delegations availed themselves of this opportunity and submitted the following written statements.
13. The Delegation of China was pleased to see that the IGC was addressing more efficiently, under its new mandate and work program, the protection of TCEs/folklore, TK and GRs. The Delegation expressed its hope that IWG 1 had accumulated valuable experiences and would make suggestions to the current session, by furthering the deliberations on the issue of TCEs/folklore, as well as finding an effective method to advance the deliberations on the protection of TK and GRs. In noting the progress made at the CBD conference in Nagoya, it expected that, with the full collaboration and active participation of Member States, the IGC would become even more efficient and practical in carrying out its work in all fields, so as to make considerable achievements as quickly as possible. The Delegation committed itself to working together with other Member States in a positive and constructive manner in the common endeavor to strive for such achievements.
14. The Delegation of New Zealand considered the issues concerning the protection of TK, TCEs and GRs to be important and would engage constructively in the negotiation of the text of an instrument(s) on these matters. While there were still some concerns that the IGC had not agreed on underlying policy objectives or high level principles, it noted that the IWG 1 had made significant progress with the substantive provisions. Therefore, the Delegation was prepared to use the IWG 1 text as the basis for the work on TCEs, though it required further refinement to make it more flexible. Further, the work of IWG 1 in refining the draft provisions on TCEs would provide a useful precedent for the Committee’s work on TK. It said that in engaging in the development of an international legal instrument(s), and making comments on the draft provisions on TCEs and TK, New Zealand did so on a without-prejudice-basis, noting that it may need to come back to some of those issues at future IGC meetings. This was in part because the release of a long awaited report by the New Zealand Waitangi Tribunal was imminent. The Tribunal had been considering whether the New Zealand Government had met its obligations to Maori, the indigenous people of New Zealand, with respect to the protection of TK, TCEs and GRs. It was expected that the Tribunal would make a number of recommendations relevant to the development of policy on IP and TK/TCEs, and wished to give these due attention and preserve the ability to take the recommendations into account in developing domestic policy and in forming a view on the sort of protection that may be required at the international level.

15. The Delegation of Indonesia, in appreciating the work of the IGC during the 16th session that took place in May 2010, conveyed its gratitude to the Secretariat for preparing the IGC materials and to the experts for their professionalism as demonstrated during IWG 1 in July 2010. In addition, WIPO was thanked for its participation at the “*National Workshop on Intellectual Property and the Documentation and Establishment of Databases of Traditional Knowledge, Folklore and Intangible Cultural Heritage*” held in Bandung, Indonesia in November 2010. Further, it was encouraged by the developments and outcomes of the last session and believed that IWG 1 had provided sound advice and analysis regarding legal and technical matters of the TCE draft text. Although the IWG was not a decision-making body, its recommendations were extremely valuable and should be taken into consideration during the formulation of the draft text on TCEs. The results generated by IWG 1 would be greatly beneficial to the Committee’s efforts to establish the desired international legally binding instrument for the GRs, TK and folklore. Furthermore, it looked forward to seeing greater assistance on the GRs and TK draft text from the upcoming IWGs. As stated previously by Indonesia at the opening day of the High-Level Segment meeting of the WIPO General Assembly last September, it attached great importance to the effective protection of GRs, TK, and folklore. It was therefore committed to furthering the work of the IGC and to actively participating in negotiations concerning the text under consideration. With regard to taking into account Recommendation No. 18 of the WIPO Development Agenda, it encouraged all Member States to accelerate the IGC process and fulfill its mandate within the specified time. It was imperative that the Committee built upon its work under the recent mandate and had a strong commitment to make progress. It was confident that if all WIPO Member States engaged in solid cooperation and demonstrated flexibility, it would lead to the long-term success of the Committee’s work. In conclusion, it reiterated its strong belief that a concrete conclusion to negotiations on an international legal instrument(s) on GRs, TK and folklore would contribute to the prospect of putting an end to the current imbalances in the global IP protection system.
16. The Delegation of Brazil on behalf of the Development Agenda Group (DAG) emphasized that the protection of GRs, TK and folklore against misappropriation was a priority for developing countries. It said that the Committee had to make good and judicious use of the time available noting that the current session was the second session under the new mandate of the IGC. The IGC had less than a year to submit at the 2011 General Assembly, the text(s) of an international legal instrument(s) that would ensure effective protection of GRs, TK and TCEs. It however remained confident that this could be achieved for there was a solid basis for the Committee to make progress speedily in each of the three topics. With regard to TCEs, it noted that the background work was almost complete, citing documents GRTKF/IC/17/4 and GRTKF/IC/17/9 from IWG 1. All that remained was the narrowing down of the differences in some important areas, e.g., subject matter, scope and management of rights as well as the many existing options of language into a single text acceptable to all. This could be achieved within the tight deadline of the IGC and could inspire progress in the other two topics. As regards TK, document GRTKF/IC/17/5 also provided a consolidated basis for further text-based negotiations that would be complemented by contributions from the upcoming IWG 2. Finally, with respect to GRs, the Delegation said it was an area where progress had been comparatively smaller, as evidenced by the fact that the IGC was still working on the basis of a revised list of options. The work of WIPO in the field of GRs had to complement other related developments taking place in other organizations, in particular at the CBD and WTO. It noted that the Nagoya Protocol set forth a series of measures intended to support compliance of its provisions as well as to monitor utilization of GRs, including a system of internationally recognized certificates of compliance and the obligation that each party establishes checkpoints. WIPO’s contribution to the protection of GRs should be targeted at making the IP system compliant with the provisions of the Nagoya Protocol. A similar approach was being pursued at the WTO in a proposal for an amendment to the TRIPS agreement to include a mandatory provision for disclosure of origin of GRs in patent filings coupled with evidence of compliance with PIC and ABS. It thanked delegations who had submitted a working document on objectives and principles for GRs at IGC 16 and would revert to that discussion under the appropriate agenda item.
17. The Delegation of the Russian Federation took the floor and reported on the results of the *International Symposium on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: Towards Sustainable Development for Indigenous Communities*, organized by the Ministry of Regional Development in cooperation with WIPO, which had taken place in November 2010 in St. Petersburg. The Delegation most warmly thanked WIPO for the assistance rendered in the organization of the event. Some eighty people had participated in the Symposium, including

representatives of state bodies, officials from international organizations, people from academia and representatives of indigenous peoples from 20 countries, all participating as independent experts. There was a thorough scientific and detailed discussion, in an informal setting, on many issues related to the protection of TK, TCEs and access to GRs. One particular focus of the Symposium was indigenous peoples: more than half of the participants were actually representatives of indigenous peoples from within the Russian Federation and from several other countries. The program of the Symposium was divided into eight sections and some of the issues discussed included: definition of TK and TCEs; beneficiaries; scope of protection; misappropriation and sanctions; transitional measures; GRs; and capacity-building and sustainable development for indigenous peoples. As a result of the discussion, several general approaches to settling the issues around TK and TCEs were reached. Participants in the Symposium supported the idea of having a wide-ranging international document which would cover the various issues at the national level. Furthermore, they had agreed that documents on IP relating to TK should be made available to indigenous peoples and to local communities. Given that it was difficult to have a legal document which dealt with all of those issues, it was suggested that a draft international document be worked on. This would be the best way to achieve substantial progress. Participants in the Symposium also learned what was being done by the Government in the Russian Federation in order to ensure the substantive and continuing development of indigenous peoples, particularly the minorities. It also emphasized the experience that the Russian Federation had in that respect. When it came to working out international documents to ensure international regulations for the protection of GR, TK and TCEs, the need for continued development of indigenous people was a critical issue that needed to be addressed. The increased well-being of all people, including indigenous people, was something that could be achieved only with the proper use of knowledge and technology. Knowledge continued to be thought of as one of the most important values in the modern world, and that went for TK and TCEs at all levels. For development to be achieved, indigenous peoples had to be given the necessary support. The Delegation said that it had submitted a written account of the event which had been published as document WIPO/GRTKF/IC/17/INF/14. It hoped that materials from the Symposium and the detailed account would be useful for the work of the Committee and that it could be used as a basis for achieving maximum progress in the development of an international document.

18. The representative of ICRA believed that biopiracy was the result of a drift in the current system of industrial property which still allowed certain firms in the pharmaceutical, cosmetic and agrifood sectors to grant themselves economic monopolies on inventions which were devoid of novelty and inventive step, since they were only based on the ancestral experience of indigenous communities of their environment and its resources. This had also been confirmed by a decision made by the EPO at the end of 2009 on a patent filed by a German company on the use of *pelargonium*, a plant whose virtues have been known for generations by South African indigenous communities. He supported the work of the IGC and invited it to align its work with that of the CBD, WTO and FAO, with a view to implementing defensive measures to put an end to current abuses as regards filing patent applications based on GRs which are associated with TK. He took positive note of the creation of a database on TK as well as the relevant clauses dealing with contractual agreements to ensure access to GRs. The recent Nagoya Protocol of November 2010 on biodiversity did not guarantee sufficiently the rights of indigenous peoples to control access to and sharing of the benefits derived from GRs of their territories. The Protocol maintained a *status quo* as regards the issue of relations between IP and TK to the detriment of the indigenous peoples who are its owners. He, therefore, called for an urgent amendment to international patent law so as to oblige those filing patent applications to indicate in advance: the origin of the GRs on which the invention is based, whether TK is associated with it, and, where relevant, to guarantee the equitable sharing of benefits with the indigenous community which owned the associated TK. The indication of the origin and the guarantee of sharing possible benefits should be recognized as conditions of the validity of a patent for which registration is sought. He believed that TK should only be disclosed with the prior agreement of the indigenous communities owning such knowledge, after their informed consent has been given. Otherwise, there was a risk that secret or sacred knowledge would be irredeemably disclosed, jeopardizing the social and cultural balance of the indigenous communities in question. Although necessary, defensive protection was nevertheless insufficient to guarantee completely the interests of indigenous peoples which was why his organization also supported the work of the IGC with a view to developing an instrument of

international law which will genuinely put an end to the discrimination existing within IP between owners of industrial knowledge on the one hand and owners of TK on the other. Such work should lead to the establishment of a real legal status for TK outside the public domain. This instrument should target the rights of indigenous peoples to their cultural and intellectual assets, as clearly stated in the UNDRIP and should incorporate the principles of self-determination, informed consent of the communities which own TK, equitable sharing of the benefits derived from biodiversity, as well as respect for customary indigenous standards and protocols and their integration in the hierarchy of standards of international rights. In accordance with the UNDRIP, he believed that to make this instrument effective, the rights of indigenous peoples should be fully associated with the development of such an instrument. Lastly, considering the urgency linked to the erosion of global diversity, the absence of a protective status for TK and the challenge of adopting an international instrument, he proposed that a moratorium be declared on patent applications which were based on GRs associated with indigenous TK.

AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE SIXTEENTH SESSION

Decision on Agenda Item 3:

19. *The Chair submitted the draft report of the sixteenth session of the Committee for adoption and it was adopted.*

AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 4:

20. *The Committee unanimously approved accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/17/2 as ad hoc observers, namely: African Cultural Regeneration Institute (ACRI), Asociación Akuaipa Waimakat, Asociación de Pueblos Indígenas de Venezuela (APIVEN), Association pour le Développement de la Société Civile Angolaise (ADSCA), Consejo Maya de la Propiedad Cultural e Intelectual de Guatemala (SAQIL NAÒJ), Free University Berlin, Genetic Resources, Traditional Knowledge and Folklore (GRTKF Int.), Grand Council of the Crees (Eeyou Istchee) (GCCEI), Himalayan Folklore and Biodiversity Study Program IPs Society for Wetland Biodiversity Conservation Nepal, Intellectual Property Assets Rights Management (IPARM), Organización Nacional Indígena de Colombia (ONIC), Pacific Island Museums Association (PIMA), Sonccoypa Cusicuynin, Tanzanian Intellectual Property Rights Network (TIP-Net) and the Union for Ethical Bio Trade.*

AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES: VOLUNTARY FUND

21. The Chair introduced documents WIPO/GRTKF/17/3 and WIPO/GRTKF/IC/17/INF/4.
22. He recalled the decision of the General Assembly to create a Voluntary Fund to support the participation of indigenous and local representatives of accredited NGOs and the decision in September 2010 to extend the Fund's operations to the IWGs. The Fund had operated very successfully. It was widely regarded to be transparent, independent, and efficient. The Secretariat had launched a fund-raising drive aimed at replenishing funds in Fund. He implored all Member States to make pledges, to contribute to the Fund, as it supported the participation of indigenous people which was very important in the work the Committee.
23. The representative of FILAIE informed the Committee of on-going discussions between itself and WIPO for the organization of a major event in one of Spain's intercultural cities. All artists representing Latin American organizations would be collecting proceeds which would be donated to the Voluntary Fund. FILAIE would continue its discussions with WIPO.
24. The representative of Tupaj Amaru stressed the importance of the Voluntary Fund to ensure the participation of indigenous experts in the work of the IGC. He requested the establishment of a fair and equitable policy for the distribution of funds.
25. The Delegation of South Africa pledged to contribute to the Voluntary Fund as it had previously done. On behalf of the entire IGC, the Chair warmly thanked South Africa and encouraged other delegations to follow its example.
26. In accordance with the decision of the Committee at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63) the seventeenth session was preceded by a half-day panel of presentations on "What role does the 'public domain', or a similar concept to it, play in your indigenous, traditional or local community?", chaired by Mr. Preston Hardison, Tulalip Tribes, Washington. These presentations were made according to the program (WIPO/GRTKF/IC/17/INF/5). The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is contained below:

"All of the speakers emphasized the special nature of traditional knowledge (TK), and traditional cultural expressions (TCEs), and placed it apart from the concepts and logic of the public domain in the Western intellectual property system. Several emphasized the importance of customary law in defining the norms against which indigenous peoples evaluate the use of TK and TCEs. They also emphasized the spiritual dimensions, and their understanding that what made them traditional was their long history, and close, integral connections with spiritual beliefs, the ancestors, and to the land. While there was no universal objection to the use of traditions for commerce, indigenous peoples reserved the right of determine the use of their TK and TCEs. Domestic and regional initiatives that defined protected TK and TCEs, recognized customary law, and *sui generis* reform of existing laws were discussed. It was clear from all presentations that the public domain presented a particularly difficult issue for indigenous peoples, and a significant barrier to sharing with confidence that their values would be respected. They stressed the importance of recognizing the decisions that arose from customary practices. Respecting the rights and obligations, in their view, was necessary for the continuation of their cultures and practices that maintained and developed TK and TCEs, as opposed to the short-term monopolies granted, that ended in secular knowledge becoming part of the public domain.

Mr. Gregory Younging of the Creative Rights Alliance in Canada presented his views on the role of the public domain concept, focusing on experiences in Canada. He reviewed some of the concepts that existed at the time of the colonization - such as the view of indigenous peoples as primitive and the Doctrine of *Terra Nullius* and Discovery - that legitimized the displacement and non-recognition of customary legal systems that had governed TK for over 5-30,000 years. The issues were also set in the context of the attempted assimilation of aboriginal peoples in residential schools, alienating them

from the source of their traditions. The last several centuries in Canada had also been marked by large-scale collection of aboriginal culture, and appropriation of traditional technologies such as snowshoes. Such acts had dispossessed indigenous peoples of their TK governance systems and colonized them through Western intellectual property laws. In this foreign legal system, TK was not protectable because it was too old, its authors were collective and could not be identified. He suggested that this legal approach had treated TK as *gnaritas nullius* - "nobodies' knowledge", emphasizing that this ignored prior customary law, under which TK could not be universally accessed. While some TK could be shared, some must remain in the private indigenous domain.

Mr. Francis Waleanisia, with the Ministry of Culture and Tourism of the Solomon Islands, recounted his experiences in representing groups of artists, musicians and other stakeholders in drafting a law on TK and TCEs. He emphasized the threat posed by public domain, an alien concept to the cultures of the Solomon Islands. In these cultures, TK was generally thought to be vested in persons by blood ties, and used for specific purposes defined by the gods for collective use or survival. Many of the TCEs, and much of the TK had historically been kept within tribes, such as within families. The laws were being drafted in the face of community change, reinforced through cultural policies, tourism, globalization, and other influences on communities that led to misappropriation. Thus, an assessment of existing copyright laws, among other laws, and gaps was necessary. Key elements of the draft legislation addressed the definition of the public domain; applications for the right to use TCEs; classification of TCEs protected by law; and transitional measures. The draft law made reference to the Pacific Model Law for the protection of Traditional Knowledge and Expressions of Culture. It incorporated customary law into national law, and bestowed functions on traditional authorities. He mentioned cooperative work within the ASEAN region to address the risk of TK/TCEs falling into the public domain, and were looking to *sui generis* laws, regional treaties, and non-intellectual property laws, (e.g., cultural heritage laws) to fill the gaps. The question of building public awareness of the issues, and the need to mobilize political will among leaders was raised.

Mrs. Dora Ogboi of the West Africa Coalition for Indigenous Peoples Rights (WACIPR), Nigeria, spoke of the TK held by indigenous communities in West Africa. Each community had its own traditions, and practices, and uses of genetic resources (GRs). Forest communities were threatened by bioprospectors, and illnesses like diabetes, malaria, sickle cell anemia, and asthma. TK was transformed within families, and villages. It was maintained, and spread through many forms. Bronze cuttings were used to keep records for future generations. Some TK was used for cultural continuity, where it may be used in festivals, dance, recitations, and music, and for economic sustainability, as in traditional cottage enterprises. In the *Igbo* context, the problem of the public domain was in access to TK that was communally owned, and regulated by community protocols, and norms under control of community elders. Some communities were compiling TK that was endangered, such as through traditional pharmacopeia. Community protocols were being developed to reflect customary norms under the control of community elders. Access to TK was not through the public domain, as the knowledge was collectively owned, with access based on mutually agreed terms.

Mrs. Miranda Risang Ayu Palar of *Legong Keraton Peliatan*, Indonesia, looked at the concept of the public domain in relation to the unity of Nusantara (*'nusa'* means islands, *'antara'* means the spaces between islands) in Indonesia. The peoples shared a long archipelagic history with complex relationships in relation to TK, TCEs, and GRs. The Indonesian Constitution recognized the right of people to maintain, and enhance their cultural values, and the State acted as a fiduciary that held resources in-trust. The Constitution also recognized *adat* laws, and traditional laws, as long as they were consistent with the development policies of Indonesia, and respected traditional communities. The jurisdiction of *adat* laws occurred within the space of the public domain. Public domain was a residual exhaustion of individual property rights, and community/traditional property rights. The overlap between TCEs, and TK made it difficult to distinguish the two. They were often misappropriated due to lack protection. She discussed reforms needed at the national, and international levels, e.g., endorsement of bills for TK, GRs, and TCEs; amendments to existing, and related laws; establishment of integrated database systems for defensive protection; protection where government failed to protect the rights of the people; recognition of the rights of the original

right holders as opposed to the State as the rights holder; and a legally binding instrument that recognized the rights to TK, TCEs, and GRs as being fundamental including the right to prior informed consent, and benefit sharing.

Mrs. Lucia Fernanda Inacio Belfort, of the *Instituto Indigena Brasileiro da Propiedade Intellectual* (INBRAPI), Brazil, began with the characterization of the public domain as not being a part of indigenous traditions. The application of the concept caused many difficulties. For example, in one project to promote craftsmanship, her community could not publicize many crafts on the internet out of concern they might fall into the public domain. Some elements of crafts may be individualistic, but these occurred within collective works. This was a problem of survival, and development - craftworks were some of the only ways to generate income. In other cases, there had been commercialization of clothes without prior informed consent or benefit sharing. While a picture of the clothing was available in books, it belonged to identifiable owners. While there had been recognition by the court of the right to be acknowledged, there were no laws for reparations or benefit sharing. The lack of clear safeguards limited options of their livelihood. She emphasized the social and cultural context of TCEs, TK, and GRs which originated in an ancient inalienable relationship with her people's lands. She also mentioned the creation of TK databases, and concerns about what governments could do with the information. In her opinion, such databases took TK out of their traditional context. Databases could only be created with full recognition of the right to prior informed consent.

Mr. Rodion Sulyandziga, of the Russian Association of Indigenous Peoples of the North, Siberia and Far East (RAIPON), Russian Federation, mentioned the importance that RAIPON placed on the work of the IGC. In his view, there were four legs of the existence of indigenous peoples - land, community structure that included the traditional use of resources, and of the land, language, and cultural and spiritual heritage stemming from their practices. The indigenous members of RAIPON had lost territory and language, which had repercussions on the loss of cultural heritage, TK and TCEs. He reviewed the October-November, 2010 Symposium on IP, TK, TCEs and GR in Saint Petersburg and the Tiger's Summit, a symposium on the conservation of tigers. While strong statements were made at both meetings, they needed to be backed by action, noting that the meetings were held very far from where the indigenous peoples lived, limiting their participation. He observed that some existing laws prohibited the use of certain resources by indigenous peoples that were necessary for their development and identity, citing the example of problems encountered by the *Udege* people, who lived in tiger forests, where conservation laws interfered with the practice of their traditions”.

Decision on Agenda Item 5:

27. *The Committee took note of documents WIPO/GRTKF/IC/17/3, WIPO/GRTKF/IC/17/INF/4 and WIPO/GRTKF/IC/17/INF/6.*

28. *The Committee strongly encouraged and called upon members of the Committee and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.*

29. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Stanley S. ATSALI, Patent Examiner, Kenya Industrial Property Institute, Nairobi, Kenya;*

Mr. Heinjoerg HERRMANN, Counsellor, Permanent Mission of Germany, Geneva; Mrs. Lucia Fernanda INACIÓ BELFORT, representative of the Instituto Indígena Brasileiro para Propriedade Intelectual (INBRAPI); Mr. Musa Usman NDAMBA, representative of the Mbororo Social, Cultural and Development Association (MBOSCUDA); Mrs. Antonia Aurora ORTEGA PILLMAN, Ejecutiva, Dirección de Invenciones y Nuevas Tecnologías, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI), Lima, Perú; Ms. Poppy SAVITRI, Director of Traditions, Directorate General of Cultural Values, Film and Art Ministry of Culture and Tourism, Jakarta, Indonesia; Mr. Ngwang SONAM SHERPA, representative of the Nepal Indigenous Nationalities Preservation Association (NINPA); and Mr. Emin TEYMUROV, Attaché, Permanent Mission of the Republic of Azerbaijan. The Chair of the Committee nominated Mr. Vladimir Yossifov, Vice Chair of the Committee, to serve as Chair of the Advisory Board.

AGENDA ITEM 6: TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

30. Upon the invitation of the Chair, Mrs. Savitri Suwansathit (Thailand), speaking as the Chair of IWG 1, reported to the IGC on the outcomes of the work of IWG 1. She recalled that the Committee, at its sixteenth session, had decided to establish three IWGs. IWG 1, dealing with TCEs, had worked within the following mandate: (1) support and facilitate the negotiations taking place in the Committee and (2) provide legal and technical advice and analysis, including, where appropriate, options and scenarios, for consideration by the Committee. IWG 1 had strictly respected its mandate. She drew attention to the three IWG 1 documents which the Secretariat had prepared for consideration by the Committee: (1) WIPO/GRTKF/IC/17/8 (Summary report of the work of IWG 1); (2) WIPO/GRTKF/IC/17/INF/7 (Record of deliberations at IWG 1), where comments and questions were made and raised in regard to document WIPO/GRTKF/IC/17/4 Prov.; and (3) WIPO/GRTKF/IC/17/9, containing the draft articles and options on the protection of TCEs, as proposed by IWG 1. The recommended draft articles, prepared by the informal open-ended drafting groups, benefited from the wide-ranging participation of experts and from the subsequent work done in plenary, where the rapporteurs of the informal groups had presented their recommendations for review and discussion to ensure transparency and full participation. Document WIPO/GRTKF/IC/17/9 not only contained the recommended draft articles, which consolidated and streamlined the views and analysis of the original text (document WIPO/GRTKF/IC/17/4), but also contained technical and legal explanations and arguments provided by experts as to why and how their recommendations were thus formulated. The three documents amply spoke for themselves in terms of quality and technicality and richly reflected the profound and extensive discussions and reasonably thought-out analysis and recommendations, the gist of which essentially culminated in document WIPO/GRTKF/IC/17/9. As Chair of the IWG 1, she expressed her gratitude and honor for the opportunity to have worked with such a group of experienced, wise, and dedicated experts. She expressed gratitude for the support of the Vice Chairs nominated by the diverse geographical groups. The subject of protection of TCEs was wide and extensive and, although divergent views had been expressed, IWG 1 had competently accomplished its task within the given time. The work of IWG 1 had been carried out in a very transparent and

participatory manner, thanks to the spirit of cooperation and friendship among the experts. In her role as Chair of IWG 1, she transmitted to the Chair of the Committee the hard work, cooperation and dedication of IWG 1. She transmitted the recommended articles, together with the corresponding explanations (document WIPO/GRTKF/IC/17/9), which she suggested be used as basis for the Committee's substantive negotiations on TCEs. Member States and observers were also thanked for having nominated qualified experts to IWG 1 and for having supported the IWG 1's work throughout, so that it could successfully complete its task, which deserved the consideration of both the Chair and the Committee.

31. The Delegation of Bangladesh, on behalf of the Asian Group, thanked the Chair of IWG 1 for presenting her report and appreciated the able stewardship that had led to the successful outcome of IWG 1. The Delegation welcomed the work done by IWG 1, which needed to be preserved and built upon, and which should set a precedent for the work to be carried out in IWG 2 and 3 in February 2011. It stressed that document WIPO/GRTKF/IC/17/9, prepared at IWG 1, should be considered as the principal basis for text-based negotiations for an international legal instrument on TCEs. The document could be complemented by other relevant documents under consideration, as well as by comments and views by delegations in the course of the negotiation process of the Committee. It was mindful of the divergent views of experts participating in IWG 1. However, divergences tended to be pronounced in only a few articles and a large part of the text appeared to have broad agreement among experts. It recommended that the Committee deal with the non-controversial elements in the draft text, while an informal drafting group could be set up to work on some of the elements characterized by a wide divergences of views. It wished to contribute to the proposed parallel negotiation process. It said that by making the best use of time and resources, considerable progress could be made on text-based negotiations. However, it noted that it was perhaps not possible to conclude the work on text-based negotiations in the seventeenth session. It was useful to determine how the Committee intended to proceed with the remaining work on TCEs, if any, especially within the work program set out for the eighteenth session of the Committee. Finally, it expressed its preference for a definition of "beneficiaries" in Article 2 that would encompass indigenous communities, among others. The Delegation had difficulty in accepting a term that would restrict the scope of beneficiaries.
32. The Delegation of Belgium, on behalf of the European Union and its Member States, expressed its gratitude to the Secretariat for having prepared the set of documents, for having organized IWG 1, and for the summary report and the document setting out the draft articles as discussed in the drafting groups. Progress had been made and work needed to continue, taking into consideration the documents emerging from IWG 1 and previous work undertaken by the Committee. Document WIPO/GRTKF/IC/17/INF/8 on the concept of the public domain was noted as a useful contribution to the discussion, as it was important not to impede the public domain, so as not to restrict creativity and cultural diversity. The Delegation stood committed to participating in a constructive manner and intervening on specific issues at the appropriate moment. Regarding procedure, it was open to discuss all documents, including the results from IWG 1, on the understanding that all the documents were open for comment for a new text on objectives, principles and articles. It noted that such a procedure should not necessarily set a precedent for future IWGs. It reiterated that work on an instrument should not prevent other ongoing, practical and useful work, such as the technical assistance and awareness-raising undertaken by WIPO at the national and international levels. Efforts had to be sustained to help countries that did not make full use of the current IP system, since many of the concerns could be addressed by existing IP rights and other areas of law.
33. The Delegation of Mexico, on behalf of GRULAC, expressed support for the statement made by the Delegation of Bangladesh, on behalf of the Asian Group. It also expressed consensus on document WIPO/GRTKF/IC/17/9, produced by IWG 1, which should be the basic text on which to carry out negotiations and additions, or even to express reservations. It was necessary to be practical and consider the very few sessions remaining before the General Assembly, by which time a clearly mapped-out way forward was needed.
34. The Delegation of Australia believed that the seventeenth session was a watershed meeting: there was a real opportunity to build on the excellent work of IWG 1 and to make significant progress on

- TCEs negotiations, which would enable the Committee to submit to the General Assembly a real outcome. It welcomed and was pleased with the success of IWG 1. The text produced by the experts provided a good basis from which to progress the work. It provided for a more balanced approach, which addressed interests of all parties and, importantly, recognized the different national circumstances of Member States and supported flexibility in national treatment. It clearly supported the interventions in favor of the negotiating text.
35. The Delegation of Canada, on behalf of Group B, thanked IWG 1 and its Chair for the work on TCEs. The Delegation supported the IWG 1 text to form the basis of discussions of the session under three conditions. First, using the text as a basis was without prejudice to TK and GRs, which would be considered by future sessions of the Committee. Second, adopting the text as a basis for negotiations did not prevent the Committee from inserting language from document WIPO/GRTKF/IC/17/4, which also continued to be a working document. The Delegation echoed the comments made by the Delegation of the EU and its Member States, by GRULAC and the Asian Group, among others. Third, the objectives and principles contained in document WIPO/GRTKF/IC/17/4 had to be added to document WIPO/GRTKF/IC/17/9 for consideration by the Committee.
 36. The Delegation of China was pleased to see that IWG 1 had provided valuable comments and suggestions to promote TCEs discussions. It thanked all the experts for their diligent work. The Delegation agreed in principle that document WIPO/GRTKF/IC/17/9 should be considered as a basic document for further discussions in which the Delegation was ready to participate actively. It hoped that the session would achieve tangible results in the protection of TCEs.
 37. The representative of CISA thanked the Asian Group for supporting a broad application of the rights of indigenous peoples. He noted that many indigenous peoples were not happy with what had come out in the CBD. He pointed out that ILO Convention 169 had not had any impact on nor made any reference to the right to self-determination. In assessing the rights of indigenous peoples, WIPO should not reduce their scope and application and should continue to promote them. The Committee should not look to subjecting their rights to national legislation.
 38. The Delegation of Angola, on behalf of the African Group, thanked the Chair of IWG 1 for having produced excellent work. It believed that the results reflected the discussions that had taken place, not at the political level but at the level of experts. It reminded that it was not a political document, but one produced by experts, who had gone through the articles and set out options. It noted a certain consensus on each article on how the document should be and which negotiations should be sent to a diplomatic conference. The main purpose of the Committee was to go through it, article by article and then choose and adopt the option that had consensus. The Delegation welcomed all documents, but the Committee was to take note of these as information documents, and not to open debates, as that was the purpose of the IWGs. Regarding the objectives and principles, it believed the complementary documents could be used as input. New information could be noted without spending too much time on it, as this would be considered further by the two IWGs. The Committee should straight away begin discussions of the options. The Delegation thanked the Delegation of Bangladesh, on behalf of the Asian Group, for supporting that approach. The document of IWG 1 should be the basis for negotiation.
 39. The Delegation of Switzerland appreciated the technical discussions on TCEs that had taken place at IWG 1. It had been a successful meeting, with experts from all over the world trying to build common ground. The same form should guide IWG 2 and 3. It believed the outcomes of IWG 1 as contained in document WIPO/GRTKF/IC/17/9 represented substantive progress compared to document WIPO/GRTKF/IC/17/4. It supported the view that the Committee should continue its negotiations on the basis of document WIPO/GRTKF/IC/17/9, which should still be open for comments. Also, there had to be the possibility of using text from other documents. It recalled that the mandate of the Committee was to reach agreement on a text of an international legal instrument for the protection of TCEs by 2011. It looked forward to continuing fruitful negotiations.
 40. The representative of Tupaj Amaru believed that IWG 1 had clarified the fundamental problems that had taken up so much of the Committee's time. He stated that the indigenous experts had contributed

to the discussion and had proposed specific themes, concepts and articles for the draft provisions. He recalled the Chair's statement that proposals by observers would only be accepted if they received support from Member States. He wished to know whether proposals from indigenous peoples could be taken up directly, because indigenous peoples were the main stakeholders. He wished that document WIPO/GRTKF/IC/17/9 form the basis of discussions.

41. In response to concerns raised by the representative of Tupaj Amaru, the Chair stated that it was a matter that the Committee had deliberated upon, and a decision had been reached that an observer could make contributions and proposals. Unless it received support from a Member State, it would be dropped. He thanked the Chair of IWG 1 for her good work and all the delegations that had taken the floor. He also noted the apparent support from all groups on the draft articles as prepared by IWG 1 as a negotiating text. He believed the Committee should confirm and appreciate the effectiveness and legitimacy of the IWGs. It was, however, necessary to emphasize that the Committee remained the negotiating forum.
42. The Delegation of Canada reiterated its earlier intervention that the objectives and principles appearing in document WIPO/GRTKF/IC/17/4 should be introduced into document WIPO/GRTKF/IC/17/9.
43. The Chair opened the floor for comments on Article 1.
44. The Delegation of Trinidad and Tobago proposed the addition, in sub-paragraph (c), of the words "sports and traditional games", to be consistent with Article 31 of the UNDRIP. Further, while it recognized the good work of IWG 1, it stated that the term "sport" referred to an organized form of competitive physical activity, with an emphasis on physical activity. That was to be contrasted with "games", which denoted card games, board games, etc., which required some kind of mental skill. That was also in contrast to the forms of recreation usually described as forms of noncompetitive activities, such as jogging. It was for the Committee to analyze whether omitting "sport" from any concluded text would result in the omission of a vital form of protection for the intended beneficiaries. For instance, in Trinidad and Tobago and other Caribbean countries, there were traditional sports, like the goat and crab racing in Tobago, which would not be protected under the genus of "games". Under sub-paragraph (d), the Delegation noted that the "works of mas" had been deleted. It noted the particular importance of the protection of its indigenous carnival. It also stated that a model provision entitled "works of mas" had been introduced in 1996 in the Copyright Act. At the sixteenth session of the Committee, the term had been included in the text of Article 1, under "tangible expressions". At IWG 1, there had been a streamlined version of Article 1, which omitted several of the original items. While it was of the view that that version was an improved draft, it respectively believed that the terms "works of mas" had to be retained in the final draft. It was aware of contentions to the effect that all the enumerated items would fall under the heading of "art or handicraft" or both, but "works of mas" would fall under neither, it could be gleaned from the definition of the term. "Works of mas" did not fall under the term "material expressions of art" as it was much more than that. They were to be protected as TCEs rather than under copyright. The definition of "works of mas" involved a combination of tangible manifestation, such as a physical costume, and intangible manifestation, such as a style of dance, a style of oratory, etc. It had to be seen as performative acts that comprised elements of tangible and intangible culture. So essential was the performance that they were inseparable and therefore any attempt to separate the two led to faulty policy articulation. Therefore, whatever solution was designed could not suit the situation to which it was applied. Works which received copyright protection usually were the product of the *sweat of the brow* of an individual; by contrast, with TCEs, the notion of author was absent. It restated that "works of mas" were more than physical items of costume and handicraft; they also included performance, elements of song, lyric, speech and dance, and were undeniable intangible things associated with a culture. In that context, the Delegation was of the view that "works of mas" had to be retained in the article.
45. The Delegation of Egypt stated that the Delegation of Trinidad and Tobago was correct to a certain degree. First, it was not possible to transmit something that was tangible or intangible from one generation to another, except if it was an expression of a community. Therefore, the condition was

that it had to be *collective* and not attributable to just one individual. Second, it was well-known that TCEs creators were usually unknown; in the definitions of traditional folklore, such collective expressions were unknown as to the source. There were other documents, such as the UNESCO Convention on the Safeguarding of the Intangible Heritage, which dealt with the same topic. Throughout the discussions of that Convention, many of the delegations had not been satisfied with the term “collective” and hence the term was not used for those kinds of expressions. But it was understood that the TCEs were transmitted from one generation to the next, and that they were expressions of a traditional culture. A TCE had to express the community that had adopted it. On the question of games and sports, there was an agreement that the term “games” could include mental and physical games. The term referred to the forms of collective cultural expression currently being dealt with, and therefore it was agreed that this formulation would be the best.

46. A member of the Delegation of USA, speaking as the rapporteur of Article 1 at IWG 1, stated that his group had believed that those cultural aspects of sports, including TCEs, were adequately captured by “ceremonies, rituals and games”. Regarding “works of mas,” because the list adequately captured intangible and tangible expressions, the two aspects of “works of mas” would be covered in the same way that Native American dances, which contained significant tangible cultural expressions, were covered. Many TCEs involving dance and song had both intangible and tangible elements; the list was intended to capture everything.
47. The Delegation of Belgium, on behalf of the EU and its Member States, echoed the statement made by the Delegation of Canada and stated that it too would like to be able to examine the objectives and principles, and would be pleased if they could appear in the next version of document WIPO/GRTKF/IC/17/9. It recalled that it had previously asked for a glossary to be prepared by the Secretariat. The Delegation had concerns with the words “and knowledge” in the first paragraph, because it could induce some confusion with TK. It also had a problem with the phrase “from generation to generation”, which could lead to an unlimited term of protection, an issue dealt with in Article 6. It believed that at least economic rights should have some limit in time. If the protection was unlimited in time, there was a removal of the possibility of future creative activity.
48. The Delegation of Italy shared the view of the Delegation of Belgium, on behalf of the EU and its Member States, regarding the “passing on from generation to generation” of TCEs. If one considered that the protection required the passing on from one generation to another, TCEs that were not passed on from one generation to another would not be protected. It proposed instead “tangible or intangible forms of creativity, as defined in Article 2”, which covered all forms of TCEs in the past and those more recent TCEs. Sports *per se* were not an expression of creativity; it recalled that many sports practiced today were expressions of a community, such as rugby, invented at the University of St. Andrews in Scotland and football, invented in the sixth century in Florence. It did not mean that these countries would enjoy protection for such sporting activities. Further, it believed that musical expressions should be protected in the same way as TCEs. As to paragraph 2, it had to refer to Article 2, which stated three different options for beneficiaries: cultural communities, local communities and indigenous peoples.
49. The Delegation of Barbados supported the amendment proposed by the Delegation of Trinidad and Tobago to include the words “sport and traditional” and “works of mas”. It also requested the insertion of “or nations” after the words “indigenous people or local community” in paragraph 2. Barbados did not have an identifiable set of people. For the protection of its TCEs, it needed a broad definition, because the TCEs belonged to the Barbadian people. It was flexible on whether the word “or nations” or “peoples” could be agreed, but it needed a broad definition of “beneficiaries”.
50. The Delegation of India stated that, concerning paragraph 1, it was concerned with the deleting of the word “fixation”. The justification given at IWG 1 was that the use of the words “tangible and intangible” removed the need for restating whether a TCE was fixed or unfixed. But in sub-paragraphs (a), (b) and (c), the use of the word “expressions” gave an impression of a fixation requirement as one of the conditions for protection. It needed to be clarified that the protection was irrespective of whether a TCE was fixed or unfixed. It suggested reinserting at the end of sub-paragraph (c), the words

“whether it is fixed or unfixed”. Furthermore, the Delegation was concerned with paragraph 2, which put three onerous conditions for the protection of TCEs: (1) a TCE had to be a *unique* product; (2) a community needed to prove that the TCE *belonged* to them; (3) a community needed to also prove that it was *part of their culture*. This placed the onus on the community to show that the TCE was unique, while it was not clear what “unique” meant and what it could include. Also, the word “belongs” brought in the notion of ownership; the community had a responsibility to ensure that it was *theirs* and ownership had to be established. It suggested that instead of *unique* the word “indicative” be used and instead of *belongs*, the phrase “used and developed by” be used. It suggested deleting “as part of their culture”, because that was presumed.

51. The representative of CAPAJ stated that in the case of Andean peoples, many masks had been created because communities wanted to interpret the character of the people who came with the colonizers. He did not want to leave them out of the coverage.
52. The Delegation of Egypt stated that protection could not extend to expressions which one could not describe as traditional; the tradition had to have survived for a long period and had to have been transmitted from one generation to another. So, expressions which had not been passed on from one generation to another did not deserve protection. Furthermore, not all sports were traditional. Additionally, on the notion of beneficiaries, the Delegation was in full agreement with the proposal of the Delegation of Barbados to add the word “nation” to complete the list of communities that would benefit from protection. The Delegation also came back to the term “collective”, which it believed was implicit in a number of articles.
53. The representative of GRTKF International supported the Delegation of Trinidad and Tobago and the inclusion of “sports and traditional games”. He also stated that it was important that indigenous experts be called upon to give explanations as to why terms were used and the context in which they were used. In Article 31 of the UNDRIP, “sports and traditional games” was used. To separate the two, the text should read “conventional games and traditional games”.
54. The Delegation of South Africa commented on the terms “from generation to generation” and “cultural identity” and stated that, as these were criteria for defining the subject matter, they should not be dropped.
55. The representative of Llamado de la Tierra said that having a list of both tangible and intangible TCEs was complicated. The diversity of indigenous peoples and local communities in the world was such that many TCEs could be left out of protection. However, there were many traditional practices which were common to all indigenous peoples. One of them, which could be added under subparagraph (d), was “design”, which was a fundamental manifestation of indigenous cultures.
56. The Delegation of USA, on the first part of Article 1, agreed with the Delegations of Egypt and South Africa that it was important to retain the phrase “from generation to generation” as it was a definitional element of the concept of TCEs; like the Delegation of South Africa, it believed that it addressed the definition and the core content of a TCE and did not address the issue of duration. On Article 1(1)(c), the Delegation did not support the listing of “sports”; it agreed with the Delegation of Egypt that it raised interesting questions and problems that would need to be discussed at length. As to the question of whether a TCE should be “fixed or unfixed”, raised by the Delegation of India, it agreed that that was an issue that the text should properly reflect. It was not certain that it was necessary to include that language, but it was sensitive to that consideration. In that spirit, in Article 1(1)(d), it proposed deleting “tangible expression”, and inserting the word “tangible” before “spiritual forms”. The proposal would read “...material expressions of art, handicrafts, works of mas, architecture, and tangible spiritual forms”. Next, on Article 1(2), it stated that the word “unique” was very important. To address the point made by the Delegation of India, a TCE that was an *indicative* product could be something received from another people, such as, for example, the way many people in the Caribbean and Central America played baseball. It was an *indicative* product of the local community, it was used and developed by the local community and it was part of their cultural identity. It was important to find a proper drafting that made it clear that a TCE was something that came particularly from one community. The Delegation was cognizant of the problem with words like “belong”. It referred to the

- proposal made by the Angolan expert at IWG 1, which it suggested be inserted in Article 1(2).
57. The Delegation of Japan stated that it had raised questions on the subject matter of protection in document WIPO/GRTKF/IC/17/4. Although Article 1 in document WIPO/GRTKF/IC/17/9 was more readable, the questions were still unanswered. For example, it had questions about the word “traditional”: how many generations were sufficient for the expression to be “traditional”? Further, how could a specific definition of TCEs ensure predictability for users and third parties? Lastly, it voiced concerns with the relationship with the public domain. It wondered how expressions belonging to the public domain would be treated and how the public domain would be defined in that context. It said that the ambiguity of the subject matter of protection and the lack of predictability discouraged the use of expressions by creators, and it was not appropriate to leave such fundamental issues to the discretion of the national, sub-regional and regional levels. It expected further deliberations by the Committee. Regarding paragraph 2, it suggested replacing the word “shall” with “should”.
 58. The Delegation of Switzerland pointed out that the words “and knowledge” were in brackets. It agreed that for legal reasons TK had to be distinguished from TCEs, even if in an indigenous worldview, the two might be the same inseparable concept. In the context of Article 1, it was correct to say that knowledge could also be embodied in TCEs. Therefore the brackets around the words “and knowledge” could be removed. Further, it agreed with other delegations that, in paragraph 2, the term “unique” was too narrow, as often TCEs were shared by different communities. It suggested replacing the word “unique” with the term “characteristic”, this term was also used in Article 2 and could be a compromise between “unique” and “indicative”. Finally, it echoed the words of caution expressed by the representative of CAPAJ that the Committee should be careful with additions to the text, which was the result of the experts' discussions at IWG 1 aimed at reducing the text and trying to avoid the mentioning of examples. It was not opposed to the inclusion of “sports” as it had heard convincing arguments that it was not adequately covered by “rituals” or “games”.
 59. The Delegation of Norway, regarding Article 1(2), supported the text of IWG 1, as clarified by the rapporteur. It agreed with the suggested streamlining of previous proposals, and the suggestion that protection should extend to TCEs which were the unique product of a beneficiary. That wording also helped to delimit the subject matter of protection in relation to the public domain. It reiterated that a robust public domain was very important to maintain cultural diversity.
 60. The Delegation of Mexico joined the Delegation of Switzerland in its proposal that the brackets be eliminated around the words “and knowledge.” In sub-paragraph (b), it suggested adding, after “instrumental music”, “sounds”, which are the expression of rituals.” In sub-paragraph (c), it suggested adding “gestures and body movements”. After the word “rituals”, it suggested adding “sacred places and peregrinations”. The Delegation also agreed to include “sports”. Finally, the “techniques and technologies” required for the production of a TCE would be discussed later.
 61. The Delegation of the Russian Federation stated that Article 1 needed further work, in particular paragraph 1. There was a need for more precision on the examples given in the sub-paragraphs. For example, “signs and symbols”, included in subparagraph (1)(a) were not fully founded, because they could be of purely representative art and not refer to signs. The Delegation had doubts about “rhythms” in sub-paragraph (b), because rhythms could be expressed in “instrumental music” or in “song”. If a rhythm was produced not by voice, or not through a musical instrument, then it could be expressed by an action, such as a dance. The word “handicrafts”, because it was an expression in tangible form, could be removed. “Spiritual forms or places” could refer either to an expression of art in tangible form or to architecture. If they did not refer either to art or architecture, they could be a spiritual landscape, which was not the result of any kind of human intervention.
 62. The Delegation of Kenya echoed the sentiments of the Delegations of South Africa, Egypt and USA as they related to the fundamental elements of defining TCEs in relation to “being passed on from generation to generation” and having a cultural *uniqueness* or *character*. Many countries had various TCEs, which they wanted to include in the text. It noted that the text was supposed to be an international document, which did not go into the little detail. It covered the general principle while the exhaustive list could be included in national laws. On the issue of “sports and games”, it explained

- that the reason the word “traditional” did not appear was because the chapter was about traditional “things”. It did not say *traditional* dances, songs, *etc.*, so it was assumed that games were traditional games. It wanted the Committee, especially the Delegation of Trinidad and Tobago, to bring the issue to rest. It was not that “traditional games” were not recognized, but the issue of games had to be considered in the context of the entire article.
63. The Chair added that Article 1 stated “including but not limited to” before the enumeration, so the list was not exhaustive but indicative.
 64. The representative of Tupaj Amaru stated that a glossary was needed to define “cultural identity”, “heritage”, “national identity,” and “national heritage”. “Sports” was sufficiently covered under “games”.
 65. The representative of FILAIE suggested adding, in Article 1, after “tangible and intangible forms in which they are embodied”, the phrase “in an original manner”, in order to distinguish what was specific to a particular culture with what was held in common between a number of cultures. Moreover, the words “and knowledge” had to stay in the text. To avoid confusion it should say “which is *usually*” or “*habitually* passed from generation to generation”. He was in favor of adding “gestures and body movements”, which covered other expressions and performances. He believed that “artistic and spiritual performances” had to be added in order to cover everything. However, in sub-paragraph (d), under “tangible expressions” he was not in favor of including “architecture”, because as established by the Berne Convention, it was not fully protected under IP. The designs, drawings, or models could be protected, but not a building. The inclusion of architecture could lead to confusion and conflict. In paragraph 2, he suggested replacing “unique” with “original”.
 66. The Delegation of the Islamic Republic of Iran supported removing the brackets from “and knowledge”. It also believed that “from generation to generation” was essential. It supported the Delegation of Egypt that the term of protection had to be unlimited. In sub-paragraph (d), it asked to add “sacred places” to the list. In paragraph 2, it proposed that the phrase “Indigenous people or local community” be replaced by Option 2, in Article 2, which read “Peoples and community including indigenous peoples, local communities, cultural communities and nations”.
 67. The Delegation of Australia suggested that the Committee look back at the three key characteristics of those TCEs that were sufficiently important to need special IP protection in international law, *i.e.*, not necessarily all TCEs. First, TCEs needed to be part of a living culture, and so “from generation to generation” had to be retained. It was also important that the terms be sufficiently flexible to allow for indigenous peoples who, for historical reasons, had lost their cultural identity but had recovered it and revitalized it. Second, a TCE needed to be unique to the traditional community. Third, the TCE needed to be important to the cultural identity, especially for but not only indigenous and tribal peoples. It believed that those concepts were reasonably expressed within the words proposed by the Angolan expert, as the Delegation of USA had suggested. Finally, it supported the comments made by the Delegation of Kenya that the task of the Committee was to define the concepts for an international instrument and it should not seek to provide the sort of detailed wording that was more appropriate for domestic legislation.
 68. The Delegation of Nigeria believed the idea was to see what definition Member States could adopt at the international level, which would give an idea of what the subject matter was without necessarily drawing up a long catalog of specific examples. It was not possible to bring in every illustration of what the article would likely cover. It supported removal of the brackets around “and knowledge”. It also supported the need to retain the reference to “from generation to generation”. However, it did not agree to introduce the concept of “original”. It found some merit in the suggestion by the Delegation of Mexico for the inclusion of “gestures and body movements”. It had believed that “game” was supposed to cover “sports”, but it had been enlightened that the two might be exclusive; however, the inclusion of “traditional” before “games” was not warranted. In subparagraph 1(d), it was not comfortable with the inclusion of “designs”.
 69. The Delegation of Canada stated the Committee had to avoid falling into the trap of an exhaustive list. It was an international treaty, which meant that, by definition, it had to give Member States the

necessary flexibility to interpret it in accordance with their own realities. It was much more constructive to think about the criteria rather than the specific forms of TCEs. It reminded that any community could produce TCEs, and so it welcomed the suggestion by the Delegation of Barbados for wording that was broader and not confined to indigenous communities, even though in Canada the use of the word “nation” was problematic. It also echoed the comments made by others on the importance of maintaining a strong public domain, which was necessary to promote innovation. In Article 1, it wished to keep the brackets around “and knowledge” for the sake of clarity. Also, it wondered whether the concept of “spiritual forms”, whether tangible or intangible, would include religious beliefs, for example, which probably fell outside of the scope of the treaty. Finally, regarding “sports”, unless a sport was strictly traditional, it should not be included in any list (which in any case should not exist).

70. The Delegation of India believed the Delegation of Australia had identified the fundamental questions. Paragraph 1 provided the broad definition, which was expressed with “from generation to generation”. On paragraph 2, it had two questions: (1) whether there was a link between the subject matter and the community, (2) whether the TCE was still being maintained or used as part of the cultural identity. If the two conditions were satisfied, protection had to be given irrespective of the terminology used, otherwise the majority of TCEs could be excluded. The words “unique” or “belonging” were problematic. The incorporation proposed by the Delegation of USA created more problems than it solved. The words “authenticity” and “being genuine” also created problems. The “community identity” had to be kept.
71. The Delegation of Colombia supported the deletion of the reference to architectural works, because of the confusion with architectural works, such as monuments or buildings, protected under the Berne Convention. It also stated that the list was illustrative, not exhaustive; it provided the main forms of tangible and intangible expressions to be found in the traditional cultures of indigenous and local communities.
72. The Delegation of Cameroon noted that there was no disagreement over the essence of the article as stated by the Delegations of Canada, Kenya, Nigeria and others. The international instrument could only exist if it was flexible and concise. In the end, each state would have leeway to adapt the text to its local conditions; it was clear the text could not be exhaustive for that meant ignoring the wealth of cultural diversity. It noted that “from generation to generation” was a constant characteristic of TCEs, so it could not be deleted. It also reflected a world where the expressions were transmitted or passed on. Further, to include examples would make the text not only cumbersome but it would remain incomplete as it was impossible to put in all examples.
73. The Delegation of Trinidad and Tobago stated that TCEs could not be attributed to one individual, but to a community. “Works of mas” portrayed tangible and intangible expressions, which were passed on from community to community and from generation to generation. Mas was a community not an individual affair. There was a handing down of tradition from father to son, generation to generation, through the production of costumes, art and design. Article 31 of the UNDRIP did not raise the issue of sports and games as separate items, as both sports and games were included.
74. The Delegation of Angola agreed with the Delegations of Cameroon and Canada that it was important in an international text to leave some flexibility for each national administration. It suggested deleting the proposals made by the Delegation of Belgium, on behalf of the EU and its Member States, and by the representative of FILAIE. It suggested adopting the essential and moving on.
75. The Delegation of Jamaica supported the Delegation of Trinidad and Tobago on the issue of “works of mas”. Jamaica did not have carnivals to the extent that Trinidad and Tobago had, but it did have other forms of expressions where “works of mas” were used. It was cognizant of the point raised by the Delegations of Canada and Angola regarding the interpretation of the treaty when applied to their jurisdictions. It supported the position of the Delegation of Barbados in relation to the addition of “nation”.
76. The representative of CISA stated that the culture of indigenous peoples was collective. He did not

- like the reference to “indigenous peoples and local communities”. He supported the reference to “international” made by the Delegation of Australia and also wished to include “sacred places”.
77. The representative of ARIPO suggested deleting “unique” and to leave the sentence as it was. He also suggested replacing the words “belongs to” with “is characteristic”, which would take care of the concerns of the Delegation of India. Moreover, he noticed that in the document, there were different variations of “beneficiaries”. Instead of having “indigenous people, cultural communities, nations,” he proposed that any reference to “beneficiaries” refer to “indigenous peoples, communities, and nations”. There could be a footnote to that effect.
 78. The representative of the Tulalip Tribes supported an open-ended list. Each nation could provide its own list. There was also the option of creating an annex or other document that could be open-ended but more elaborate and provide guidance to States. He also questioned the term “unique” because it limited protection to those products which were limited to a single indigenous or local community. The Tulalip were part of the Coast Salish culture group which shared many things. Furthermore, he was interested in the reference to America’s gift of basketball. In fact, Dr. James Naismith, who created basketball, was born in Ontario, Canada, and moved to Springfield, Massachusetts, USA and created the game of basketball in 1891. The question was: did Dr. Naismith fulfill any criteria being considered by the Committee? He was obviously not part of a unique cultural group, he was not indigenous, and he was not from a local community. The representative stated he had been with the Committee since the very beginning, and he had also been with the CBD since 1996. The CBD had adopted the phrase “indigenous and local communities” for beneficiaries. That phrase had been imported into the Committee and, over time, its application had expanded. Originally, it was meant to focus on those small-scale communities that had very different cultures, different spiritual and religious beliefs. But some wanted to expand it to “nations” or to “cross-national groups”. This made it more difficult for the IP system to deal with. Originally, protection was for “indigenous peoples” (in plural throughout the document) and “local communities”.
 79. The Delegation of Algeria pointed out that in the French version, the phrase “but not limited to” did not appear. Also, the word “also” appeared in the French version, which had no corresponding phrase in the English version. The versions had to be aligned.
 80. The Chair stated that while the text from IWG 1 was neat and precise, the new text that was emerging was becoming more complicated again. There appeared to be convergence to remove the brackets around the words “and knowledge”. He also saw convergence to retain “from generation to generation”. A number of delegations had also made the point to keep the text short and precise. The point relating to sports, traditional games and “works of mas” had generated very interesting debates. He proposed that a small team work on it, composed of the Delegations of Trinidad and Tobago, USA, Kenya, Mexico and Thailand, the representative of GRTKF International and other interested delegates who wished to join. The Chair recalled that IWG 1 had produced draft articles, which the Committee, as the negotiating body, had to review fully. He believed a fast review was needed, as it was not possible to conclude the review at that stage. He proposed continuing to review the articles and to capture comments and proposals on the screen. He asked all delegations to take the floor on substantial issues on what they considered policy questions. The Chair reminded that IWG 1 had recommended that the Secretariat prepare a glossary on TCEs and TK, and that the latter could be ready for IWG 2. He also restated that proposals by observers were reflected in the text on the screen, and would remain in the text if they received Member State support. He invited Member States to indicate if they supported the proposals by observers, or else, according to the rules, the proposals would be dropped.
 81. The Delegation of Belgium, on behalf of the EU and its Member States, confirmed the understanding that although they were moving forward to other articles, none of the articles were closed. It reserved the right to return to Article 1.
 82. The Chair confirmed that the understanding was correct.
 83. The Delegation of the Islamic Republic of Iran suggested adding, in paragraph 1, after “intangible”, the

phrase “or a combination thereof”.

84. The representative of Tupaj Amaru, on Article 1, suggested the following text:

- “1. *The aim of the current international agreement or instrument is to protect traditional cultural expressions and expressions of folklore in all its forms, whether tangible or intangible in which are expressed, appear or are manifested in the cultural heritage and which are passed on from one generation to the next in time and space.*
2. *Such legal protection of traditional cultural expressions against any misuse, (piracy) under Article 1 shall apply in particular to:*
 1. *phonetic or verbal (UNESCO employs the word oral) expressions, such as: stories, popular tales, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, etc.;*
 2. *musical or sound expressions, such as songs, rhythms, [and] indigenous instrumental music;*
 3. *expressions by action, such as dances, plays, ritual ceremonies, traditional games and other performances, theater and folk drama;*
 4. *tangible expressions, such as productions of art, in particular, drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork and jewelry; architectural and/or spiritual forms;*
 5. *protection and safekeeping shall apply to all TCEs/EoF that are the living memory of an indigenous people or local community and belong to such people or community as an intrinsic part of its cultural, social and historical identity or heritage.”*

85. The Chair opened the floor for comments on Article 2.

86. The Delegation of Belgium, on behalf of the EU and its Member States, stated its preference for Option 1. Alternatively it suggested the text refer to “the beneficiaries as defined in Article 2”.

87. The Delegation of Italy supported the statement made by the Delegation of Belgium, on behalf of the EU and its Member States. All articles needed to be brought into line with the definition in Article 2. The phrase “in whom the custody and safeguarding of traditional cultural expressions/expressions of folklore are held” was a repetition of “and who maintain use or develop”. The drafting had to be modified to avoid any duplication or repetition. It also noted that, logically speaking, there was no distinction between TCEs and EoF in the text. It believed that if there was a distinction, it needed to be clarified. EoF were something more topical, not necessarily handed down from generation to generation.

88. The Delegation of India preferred Option 2, in which it proposed replacing “for example” with “including”. It also suggested deleting “custody and” as well as “entrusted or held” and replacing it with “presumed to be vested”. It also suggested replacing “and” with “or” at the beginning of Option 2, in the second cluster, then replacing “characteristic or genuine” with “indicative”, as used in Article 1. At the end of that sentence, it proposed adding: “In case a traditional cultural expression/expression of folklore is specific to a nation, the authority as determined by the national law”.

89. The Delegation of Bangladesh, on behalf of the Asian Group, preferred Option 2. It also suggested that the Committee consider replacing the long phrases throughout the text with the word “beneficiaries”, with the understanding that Article 2 would contain the exact definition of the term “beneficiaries.” It also supported Option 2 in the second cluster. It called for consistency between Article 1 and 2.

90. The Delegation of New Zealand preferred Option 1 and expressed concern that Option 2 would extend the scope of beneficiaries to be covered by an international instrument on TCEs beyond indigenous people and local communities. If the scope of beneficiaries expanded, then the public domain would become more of an issue and the possible scope of protection would have to be reviewed. Turning to the second set of options, referring to “the relevant law or practices”, it considered that flexibility was required to take account of different domestic circumstances; while some countries had legislation on

that point, others did not and would not consider it appropriate to legislate on matters dealt with in customary law or practices. If there was disagreement in the Committee on these options, one solution was not to include either text. As an option, Article 2 would then have three elements, (1) “for the benefit of indigenous and local communities”; (2) “in whom the custody and safeguarding of the TCEs are entrusted”; (3) “to maintain, use or develop TCEs.” Accordingly, Article 2 would be silent on the reference to “relevant laws or customary practices” thus providing domestic flexibility to choose to refer to either.

91. The Delegation of the United Kingdom preferred to adhere to the simplified text of IWG 1. It did not want to obscure the valuable work of the IWG experts. It supported the remarks of the Delegations of the EU and its Member States and of New Zealand. It preferred Option 1 and considered using that throughout the text.
92. The representative of CAPAJ recalled that at IWG 1 he had stated that “indigenous peoples” was already duly consolidated in the UNDRIP and was a term supported by many studies. “Local or cultural communities” and “nations” seemed to water down the beneficiaries directly receiving these benefits, *i.e.*, the indigenous peoples. Concerning use of the term “nations”, he reminded that indigenous peoples of Canada called themselves “First Nations”. There was thus a difference between nations and first nations.
93. The representative of INBRAPI stated that the Brazilian Constitution clearly expressed the obligation of the State to protect cultural manifestations. She preferred Option 1 in the first cluster: it was clear and direct. In the second cluster, she preferred Option 2 because not only did it make reference to the UNDRIP (and Article 31 made a clear reference to TCEs), but also because it spoke of “their law or practices”. It was impossible to preserve and maintain the TCEs forgetting social organizations, customs and customary law.
94. The representative of MBOSCUDA supported the statement made by the Delegation of the EU and its Member States on Option 1. The use of “for example” and “nation” in Option 2 was quite ambiguous, especially in Africa. He proposed that “nations” be changed to “first nations” rather than leaving it open. On Option 2 in the second cluster he also supported that the reference to the UNDRIP remain on the table because it protected *their* practices and laws.
95. The Delegation of Indonesia believed Option 2 represented the global interest of the communities, so “peoples and communities” reflected the consistency of the communities. The words “for example” could introduce confrontation between the proponent and opponent states. It preferred Option 1 in the second cluster because it made reference to national law and regulation of individual states.
96. The Delegation of Canada preferred Option 1 but would add, at the end of that sentence, “and individuals of those communities” because there could be some circumstances in which individuals within communities were holders of TCEs. For the second cluster, it preferred Option 1, but added an “s” to “laws”. Further, the way Option 1 was worded captured Option 2. It proposed deleting the last paragraph because it was redundant.
97. The Delegation of Australia supported a position which attempted to bring together the interventions of the Delegations of New Zealand, Canada and Indonesia and which identified the beneficiaries as “indigenous peoples, local communities, cultural communities, and individuals”. It supported, in the second cluster, Option 1, the proposal by the Delegation of Canada to have “relevant laws” which allowed domestic law to determine whether it was relying on its domestic legislation or customary law and practices. Also, depending on the drafting of Article 1, it supported the proposal by the Delegation of Canada to delete the last paragraph, but suggested it be kept until there were final versions of the articles. In addition, it suggested adding to Article 2 “There should be discretion at the national level to determine the best means of distributing the benefits to the owners, to be exercised in consultation with those owners”. This could perhaps overlap with Article 4 and might not be necessary if the Committee believed that that discretion was properly reflected in Article 4.
98. The Delegation of USA aligned itself with the views expressed by the Delegations of Italy, New Zealand, UK and Canada, as well as the representative of MBOSCUDA on Option 1 in the first cluster.

The Delegation took cognizance of the proposal by the Delegations of Canada and Australia for the addition of “individuals” and stated that it had interesting ramifications in relation to Article 1. As to the second set of options, the Delegation was interested in the suggestion by the Delegation of New Zealand to streamline the paragraph by removing the options, and simply allowing the paragraph to proceed through its three components.

99. The Delegation of Colombia supported Option 1 in the first cluster. It did not agree with the reference to “in whom the custody and safeguarding of traditional cultural expressions/expressions of folklore”, it preferred simply keeping “in accordance with”. There was the possibility that TCEs could be managed by the beneficiaries or by another state body, as was the case with copyright and collective management organizations. In the second cluster, it supported Option 1, but suggested adding “national” after “relevant”. It also agreed with deleting the paragraph following Option 2, as the Delegations of Canada and Australia had proposed.
100. The Delegation of the Islamic Republic of Iran could not accept Option 1. It preferred amending Option 2, by including “nations” after “peoples”, and by adding “individual groups and families” at the end of the sentence. In the second cluster, it supported Option 1. The role of government in management would be pivotal and the role of national legislation was important.
101. The Delegation of Mexico stated that it had originally been in favor of Option 1 but that, in view of the recent comments, it supported Option 2, which was broader and included the substantive elements. It supported deleting “for example” and replacing it with “including” and to follow on with “indigenous people and local communities”. In the second cluster, in Option 2, it suggested adding “including customary law and community protocols”.
102. The Delegation of Trinidad and Tobago expressed its preference for Option 2 in the first cluster as amended, *i.e.*, replacing “for example” with “including”. It also suggested adding the word “control”, which was consistent with Article 31 of the UNDRIP.
103. The representative of Tupaj Amaru made the following proposal:

“The legal protection of traditional cultural expressions/expressions of folklore shall be national and international and is designed to ensure fair benefits for indigenous people, local communities and social groups which are holders of this cultural heritage and

 - a) *in whom the custody, the care, the safeguarding and protection of the traditional cultural expressions/expressions of folklore are entrusted or held in accordance with customary laws and practices and international law on intellectual property; and*
 - b) *who maintain, preserve, control, use and develop the traditional cultural expressions/expressions of folklore as authentic or genuine elements of their cultural and social identity and heritage.”*
104. The representative of the Tulalip Tribes said it was inappropriate to include “individuals” and “families”. The *sui generis* regime was for indigenous peoples and local communities, and there were already laws that dealt with individuals and families. Individual and family rights within indigenous peoples and local communities were expressed within a collective context and it was the collectivity that controlled how those rights were implemented. Individuals could not actually be owners of collective TCEs, it was the collectivity that owned those. On the second cluster, eliminating the two options could be useful to provide for flexibility. Further, he was interested in but did not understand the Delegation of India's addition of “presumed to be vested”. Finally, he wished to have a reference to the UNDRIP. Also, it was not so important to define “beneficiaries” as long as “indigenous peoples” was maintained.
105. The representative of CISA stated that, in the first sentence, he preferred “shall”. He preferred Option 2. The application of the word “nation” needed more discussion. He supported the statement made by the Delegation of Trinidad-and-Tobago and the addition of the word “control”. He did not agree with the streamlining proposed by the Delegations of New Zealand and USA. On the use of “national law,” he said that meant that indigenous peoples had to surrender their right and leave it to the Crown to make important decisions pertaining to their property rights, so it was discriminating. He expressed

concern with the use of the term “individuals”. Concerning “relevant law or practice”, he said the *sui generis* system needed to be relevant to *international law*.

106. The Delegation of South Africa, on behalf of the African Group, preferred Option 1. It recommended shortening the definition, which should read “Indigenous peoples, communities and nations”, adding a footnote at “communities” to explain what communities were and their different layers. On the second cluster, it preferred Option 2, because it was consistent with the wording “in whom the custody and safeguarding of ...” It did not support the addition of “individuals”.
107. The Delegation of Barbados, relating to the first cluster, did not support Option 1 because it did not take into account the reality of Barbados, a small island developing state, where the TCEs were for the most part owned by the Barbadian society as a whole. It, therefore, supported Option 2, which included the word “nations”, which was sufficiently broad to address the concerns of Barbados. It was however, flexible with respect to the use of the word “nations”, provided that suggestions by Member States on alternative language would be adequate to provide protection for Barbados TCEs.
108. The Delegation of Singapore was still considering the options. It had concerns on how the article would be implemented in the context of sovereignty and territoriality.
109. The Delegation of China preferred Option 2. It supported the legitimate demands of indigenous peoples. The Delegation stated that, because in China there was no concept of “indigenous people”, the Delegation expressed concern about the meaning of “local communities”. The text had to be flexible and reflect the actual situation of different countries. It had to include “nations”, “state” and other concepts, such as “minorities”. It could also consider discussing Option 1, following the changes put forward by the Delegation of South Africa.
110. The Delegation of Chile stated that, in an area as important as determining who the beneficiaries of protection were to be, there was a need to have as much legal certainty as possible. The right option was thus Option 1. Certainty was essential in order to have more clarity on the object of protection: one had to differentiate between TCEs and other cultural expressions which could be in the public domain. Turning to the second set of options, Option 2 was the most appropriate. It clarified that its comments referred to the proposals as they were indicated in document WIPO/GRTKF/IC/17/9, and not to the new suggestions. It reserved the right to come back to those at an appropriate moment.
111. The Delegation of Ecuador believed that in Articles 1 and 2, the best was to have definitions which made reference to examples rather than an exhaustive laundry list. In Article 2, it preferred Option 2. It was difficult to reach agreement on what absolutely every term meant for each country and there was a risk of ending up with an endless laundry list. On the second set of options, it preferred Option 1 and the reference to national or domestic law. Each country could then proceed to regulate in accordance with domestic law.
112. The Delegation of Brazil referred only to the first set of options and supported Option 2. In fact Brazilian national legislation referred to “traditional peoples and communities” as beneficiaries. One could do without “traditional” since the expression was already captured in the chapeau of the article.
113. The Delegation of Austria proposed that the text read “in whom the custody...are entrusted or by whom they are held”.
114. The Delegation of Egypt stated that, despite the fact that Egypt did not have indigenous nations as such, it supported the idea of protection being given to the rights of indigenous peoples to protect and preserve their culture and cultural heritage. Egypt was the oldest country in the world and Egyptians strived to maintain harmony between their communities. Among the definitions, there had to be a reference to “indigenous peoples and indigenous communities”.
115. The representative of FAIRA welcomed the original draft prepared by IWG 1 and said it should continue to be the focus of discussions. As such, he supported the comments made by the Delegation of New Zealand. He preferred Option 1 in the first cluster and Option 2 in the second cluster, because there was a reference to indigenous peoples. Generally he said that “indigenous peoples” should always appear in the plural, *i.e.*, with an “s” throughout the document. A very important difference between indigenous peoples and local or cultural communities was the right of self-determination, including the recognition that indigenous peoples had the right to autonomy or self-government. He hoped that that the glossary would give a clear definition of indigenous peoples, stating their right to autonomy and self-government, including the right to maintain their institutions and

- to control their practices. He referred to Article 35 of the UNDRIP which stated “Indigenous peoples have the right to determine the responsibilities of individuals to their communities”. He recalled that some speakers had mentioned the collective interest of indigenous peoples in their TCEs. Lastly, he commented on the use of the word “nations” which the glossary could clarify.
116. The representative of the Assembly of Armenians of Western Armenia supported the statement by the Delegation of Egypt concerning the word “nation”. He stated that his people were not only indigenous, but were also one of the earliest nations. He supported Option 2 in both the first and second clusters.
117. The representative of CIEM supported Option 1 in the first cluster, which reaffirmed the collective rights of indigenous peoples which were already recognized and acknowledged in the ILO Convention no. 169 and the UNDRIP. As to individual rights, those were already governed by international law, especially the Berne Convention and the WCT.
118. The representative of BGC recommended, in the first sentence, that the word “should” be replaced with “shall”. He supported Option 1 and the position of the African Group calling for an explanatory footnote on communities. He also supported the Delegation of Trinidad and Tobago on the inclusion of the word “control”.
119. The Delegation of Algeria supported reference to “nations” in the list of beneficiaries.
120. The Delegation of New Zealand suggested putting Options 1 and 2 in the second set of options between square brackets. It also suggested putting brackets around “in accordance with”. That allowed some flexibility and did not require choosing between the options.
121. The Delegation of Nigeria aligned itself with the statement made by the Delegation of South Africa on behalf of the African Group. It wished to go along with the retention of “shall” in the first paragraph. On the first cluster of options, it preferred Option 1. It was particularly interested in how the suggestion made for a footnote would help to define the word “nations” in view of the different understandings that the word entailed. On the second cluster of options, it preferred Option 2 and suggested changing “their law” to “their laws”. The Delegation did not agree with the inclusion of “individuals”.
122. The Delegation of Morocco proposed starting the article with “Beneficiaries of the measures” and deleting, at the end of the first paragraph, “for the benefit of the”. It was in favor of Option 2, because nations had to be among the beneficiaries, since Morocco did not have the concept of indigenous peoples. The nation was entrusted with the protection of their rights.
123. The representative of Tupaj Amaru, on Article 2, suggested the following text:
- “TCE/EoF are the product of creative intellectual activity, in particular human creativity and that of historical communities.*
- The essential aim of legal protection of traditional cultural expressions/expressions of folklore, whether national and universal, is to ensure benefits or fair benefits to indigenous peoples, local communities and social groups, holders of such cultural heritage,*
- a. in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and current international intellectual property standards;*
- b. and who maintain, preserve, use or develop the traditional cultural expressions/expressions of folklore as being authentic and genuine characteristics of their cultural and social identity and cultural heritage.”*
124. The Chair opened the floor for comments on Article 3.
125. The Delegation of Barbados, referring to Article A under Article 3, requested that the word ‘or’ between “people” and “local community” be deleted, that “or nation” be added after “community”, that “or” be deleted before the second occurrence of the word “community” and that “or nation” be added after the second occurrence of the word “community”. It said that the same should apply to Article C under Alternative 1, in the first line and the last line. It also suggested, regarding Article B, under Alternative 2, that the word “should” be replaced with “shall”.
126. The representative of FILAIE, referring to Alternative 1, Article B, requested that “distribution” be added to the list of exclusive rights. Regarding Alternative 2, Article B, second paragraph, it suggested to delete “to object” as well as the last part of the sentence, which started with: “which

- would be prejudicial". It said that the same applied to Article C. His intention was to avoid the burden of proof being imposed on the community.
127. The Delegation of Japan stated that it still had doubts regarding the ambiguous way in which the scope of protection was formulated. It referred to document WIPO/GRTKF/IC/17/4, page 23. It was of the view that the present formulation increased unpredictability or uncertainty for third parties. In this regard, it expressed a preference for building upon Alternative 2, Article B, but disagreed with the proposal made by the Delegation of Barbados regarding the replacement of "should" by "shall". Reminding that the formulation of the following articles might depend on the formulation of previous articles, it reserved the right to revert to those at a later stage.
 128. The Delegation of India went along with Article A as it stood. With reference to the other categories of TCEs, it expressed preference for Alternative 1, although it expressed reservations. While it supported the principle of exclusive rights, it was of the view that those rights should be further developed in accordance with the categories of TCEs that have been developed under Article 1 and requested that Article B, under Alternative 1, be amended after the word "following", as follows: "a) in respect of TCEs/EoFs other than words, signs, names and symbols: – fixation – reproduction - public performance – translation or adaptation - making available or communicating to the public, and b) in respect of TCEs/EoFs which are words, signs, names in symbols, including derivatives thereof: (i) any use for commercial purposes, other than their traditional use; (ii) acquisition or exercise of IP rights; (iii) the offering for sale or sale of articles that are falsely represented as TCEs/EoFs made by the beneficiaries as defined under Article 2; (iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute." Regarding Alternative 1, Article B, it stated that "IPLC" should be deleted and replaced by "beneficiaries under Article 2". It suggested also that Alternative 1, Article B, specified that the envisaged "right" was a "collective right". Regarding its last paragraph, it suggested adding "for the use already made and with authorization for the continued use" at the end of the sentence. It expressed its disagreement with Alternative 2 and suggested deleting it.
 129. The Delegation of Italy wished to add the alternative "should" to "shall" in Article A, considering that the binding nature of the text had not been decided yet. It also asked that "cultural communities" be added in the first line of Article A, in accordance with Option 1 of Article 2 and to apply the same definition of beneficiaries throughout the text. It expressed its preference for Alternative 2 which provided more flexibility to each Member State in granting protection and requested that "holders" be deleted from the first line.
 130. The Delegation of Trinidad and Tobago agreed with the amendments proposed by the Delegation of Barbados regarding the description of the beneficiaries in the most comprehensive manner possible.
 131. The Delegation of USA, referring to Article A, joined the Delegation of Barbados on the addition of "nation" as well as the Delegation of Italy regarding the addition of "cultural community" for consistency with its preference in Article 2. As to Article B, without expressing any preference for Alternative 1 or Alternative 2, it supported the suggestion made by the Delegation of India regarding the deletion of "IPLC" and its replacement with "beneficiaries" under Article 2 as well as the inclusion of the term "collective" right. It nevertheless disagreed with the insertion of "for the use already made and with authorization for the continued use" that was proposed by the Delegation of India at the end of Article B under Alternative 1, since this would raise significant freedom of expression concerns in its country.
 132. The Delegation of Mexico expressed its preference for Alternative 1 and the deletion of Alternative 2. Regarding Alternative 1, it requested the deletion of "protected" in the title as well as in the first line of Article B, since it considered that it unduly restricted the scope of protection. It believed that the last paragraph of Article B needed to be deleted since it dealt with benefit-sharing rather than protection. It also supported Article C of Alternative 1.
 133. The representative of INBRAPI considered that Article 3 did not provide adequate protection nor meet the needs and expectations of indigenous peoples. She suggested that new alternatives as proposed by experts like Mr. Makiese Augusto be considered, since they included clear references to the principles of PIC and fair and equitable participation in benefit-sharing. She also urged that the text be in line with the terminology that was used in other international instruments, including the UNESCO Conventions, the UNDRIP and the CBD.
 134. The Delegation of New Zealand proposed the following simplified text:

“Adequate and effective legal or practical measures should be provided to: (a) prevent the unauthorized fixation, disclosure, use or other exploitation of secret TCEs/EoFs; (b) require the acknowledgement of indigenous and local communities as the custodians of their TCEs/EoFs; (c) protect against the offensive use of TCEs/EoFs; and (d) protect against the use of the TCEs/EoFs in trade that suggests a connection with an indigenous or local community that does not exist; and (e) where appropriate, enable indigenous and local communities to authorize the following uses of TCEs/EoFs: fixation, reproduction, public performance, translation or adaptation, making available or communicating to the public.”

135. The Delegation of Indonesia supported the proposals made by the Delegation of Barbados regarding the description of beneficiaries in Article 3.
136. The Delegation of the Russian Federation expressed its preference for Alternative 2 over Alternative 1, since the latter went into many details and provided for more exclusive rights. It suggested that any provision be completed by national authorities which would be responsible for the precise implementation modalities. It considered the difference between “holders” and “beneficiaries” as unclear in Alternative 2 and assumed that the rights of the holders and beneficiaries should be ensured equally. It also drew the attention to the fact that Article 1 might become inconsistent based on the amendments proposed regarding Article 2.
137. The Delegation of Belgium, on behalf of the EU and its Member States, supported the request made by the Delegation of Italy with regard to the addition of “should” in Article A as well as the insertion of “cultural community”. It requested that the words “legal and practical” be removed from Article A, considering that a reference to adequate and effective measures would suffice to cover all eventualities. It joined the delegations which suggested that “beneficiaries under Article 2” replace “IPLC” in Alternative 1, Article B, but, however, expressed a preference for Alternative 2. Regarding Alternative 2, it suggested adding “unless this turns out to be impossible” after the words “TCE/EoF” in the second paragraph, in accordance with the WPPT and WCT. It supported the proposal made by the Delegation of Italy to remove the word “holders” in the first sentence of the first paragraph.
138. The representative of GRTKF International wondered how the inclusion of the term “nation” in Article A could possibly be reconciled with “secret” TCEs.
139. The Delegation of Colombia expressed its broad agreement with Article A but requested that the word “appropriate” be added after the word “effective”. It supported the Delegation of Mexico regarding the deletion of the term “protected” in Alternative 1, Article B, and pleaded against the introduction of an artificial distinction between secret and non-secret TCEs since both should be protected the same way. It furthermore suggested adding the words “and prohibit the following” after the word “authorize” in Alternative 1, Article B.
140. The Delegation of the Islamic Republic of Iran suggested that the word “beneficiaries” replace other similar terms used throughout the text, e.g., “IPLC”.
141. The Delegation of UK supported Article A as amended by the Delegation Belgium, on behalf of the EU and its Member States. It also expressed its preference for Alternative 2, Article B, with the addition that had just been proposed by the same Delegation (“unless this turns out to be impossible”).
142. The Delegation of USA, referring to Article C and Alternative 2, Article B, suggested that the words “except where omission is dictated by the manner of the use” be added in Article C after “the source of the protected TCE/EoF” and under Alternative 2, Article B, after the same words.
143. The representative of MBOSCUA disagreed with the proposal made by the Delegation of the Islamic Republic of Iran regarding the description of the beneficiaries under this Article, emphasizing the rights of the indigenous peoples and the related UNDRIP.
144. The Delegation of Algeria requested that Articles 2 and 3 be streamlined regarding the way in which they described beneficiaries. It expressed support for Option 2 under Article 2 and, therefore, requested the insertion of the word “nation” in Article A as well, in two instances, in Article C under Alternative 1.
145. The representative of Call of the Earth, speaking also on behalf of CAPAJ, referred to Alternative 1, Article B and suggested that the words “economic and moral rights emanating there from” be added in the first line, before the words “TCEs/EoF”. He also suggested that the words “through prior informed

consent” be added after the word “authorize”.

146. The Delegation of Australia recognized the intention behind the suggestion made by the Delegations of the Islamic Republic of Iran and Algeria in attempting to achieve consistency in terminology. It nevertheless invited delegations to look carefully at what the provisions were seeking to achieve, referring in particular to Article A which dealt with the concept of confidential information, which did not fit easily with information that was held by nations. Regarding Article C that attempted to extend the concept of moral rights from individual creators to indigenous communities, the Delegation of Australia found it difficult to see how this derogatory treatment could in practice be extended to nations. It considered, therefore, that it might be necessary for those delegations which had a particular sensitivity about the terms that referred to beneficiaries to split the issue from those of derogatory treatment.
147. The representative of CISA expressed his reservations regarding the insertion of WPPT language in the text as just suggested by the Delegation of USA. He reiterated his concerns regarding the term “nation” which needed to be clarified. He expressed a preference for Alternative 1 and for “shall” instead of “should”, as well as Alternative 1 for Article B instead of Alternative 2. He reiterated that the text should apply to all peoples and interested parties without discriminating against indigenous peoples.
148. The representative of the Tulalip Tribes also expressed his concern regarding the insertion of WPPT language in the text and said that it might be prejudicial to the discussions regarding exceptions and limitations. The WPPT had been negotiated way back before indigenous peoples were recognized as a subject of international law.
149. The Delegation of the Islamic Republic of Iran was of the view that by referring to “beneficiaries” the draft took on board all right holders, including indigenous people.
150. The Delegation of South Africa endorsed Article A but reserved the right to come back to it in light of the many changes that had been made. Regarding Article B, it expressed a preference for Alternative 1. It suggested that “genuine good faith” be deleted from Article B under Alternative 1, since such criteria could not be established and be replaced by “proven”.
151. The Delegation of USA joined the Delegation of South Africa regarding the replacement of “genuine good faith” with “proven” under Alternative 1, Article B.
152. The Delegation of Kenya supported the last intervention made by the Delegation of South Africa. It also suggested that the Committee clarify once and for all the terms it would use to describe the beneficiaries. “Nations” might for example prove to be too broad a term, while “indigenous peoples” might exclude some potential beneficiaries.
153. The Delegation of Barbados argued that secret TCEs might apply to Barbados' population of approximately 270,000 people, which was less than the population of indigenous peoples or local communities in certain countries.
154. The Delegation of Egypt reiterated that its country fully respected the rights of all peoples, including indigenous peoples, to protect their heritage. In this regard, it requested a glossary where the meaning of “beneficiaries” would be spelled out. Such a definition would spare the Committee the need to spell out in each paragraph of the text who these beneficiaries were.
155. The Delegation of Nigeria supported Alternative 1. Referring to the alternative option made by Mr. Makiese Augusto in his capacity as expert at IWG 1, Nigeria suggested adding in Article C, under Alternative 1, after the words “derogatory action”, the words “including any false, confusing or misleading indications which, in relation to goods or services which suggest any endorsement by or linkage with such indigenous peoples, local communities or nations”.
156. In reference to the issue of beneficiaries, the Chair suggested that an open-ended informal group be set up. He suggested that the Delegations of Barbados, Colombia, New Zealand, Indonesia and the representative of Tulalip Tribes join this group. A number of additional delegations expressed the wish to participate in this group.
157. The Delegation of South Africa favored terminology already used in other international instruments, that is, “indigenous peoples and local communities”. This terminology might not be the solution for all, but it would avoid long debates in WIPO trying to define terms like “nations”. The Delegation of South

- Africa reminded that in its country “indigenous peoples” were recognized as “communities” that are parts of a diverse cultural nation. It wondered whether the term “communities” would not meet the concerns expressed by the Delegation of Barbados.
158. The Delegation of Australia supported the comments made by the Delegation of South Africa. Regarding Article 3, it was hopeful that the option of New Zealand was a possible bridge that could create some form of consensus.
159. The Delegation of Barbados responded to the suggestion made by the Delegation of South Africa regarding the use of the term “community”. It said that the Member States would not consider that all the people of Barbados constituted a “community” *per se*. It wished that clear language be used in order to guarantee legal certainty. It would accept the term “community” if there was a very clear definition of the term in a glossary or in a definition section.
160. The Delegation of Ecuador expressed a preference for Alternative 1 regarding Article B. It also wished that the term “distribution” be included in the list of actions that would be submitted to authorization and that the term “genuine good faith” be replaced by “proven”.
161. The Delegation of Senegal proposed that the interests of disappearing communities be also addressed, as it referred to a precise case in its country close to the border with Guinea.
162. The Delegation of Australia suggested some slight amendments to the New Zealand proposal. In paragraph (a), it proposed to replace the words “unauthorized fixation, disclosure, use or other exploitation” by the word “disclosure” and to leave the other rights to be covered by paragraph (e). Regarding paragraph (d), where the intention was to protect genuine TCEs against unfair competition from non-authentic works, it suggested adding “non-authentic” before “TCEs”.
163. The Delegation of Belgium, on behalf of the EU and its Member States, confirmed its preference for Alternative 2 for Article B, but considered also the proposal that was made by the Delegation of New Zealand as a replacement of Article A, Alternative 1 for Article B and Article C. It suggested removing the words “legal or practical” under paragraph (a) as well as replacing the words “indigenous and local communities as the custodians of that TCEs”, by the words “beneficiaries” as referred to in Article 2 in paragraph (b). It also suggested adding the words “unless this turns out to be impossible” be added at the end of paragraph (b). In paragraph (c), after the words “TCEs/EoFs”, it proposed that the words “which would be prejudicial to the reputation or integrity of the beneficiaries of TCEs/EoFs” be added. Regarding paragraph (d), it suggested replacing the words “an indigenous and local community” by “beneficiaries as referred to in Article 2”. It also suggested deleting the words “where appropriate, enable indigenous and local communities to authorize” and replacing those by the words “provide equitable remuneration to the beneficiaries for”.
164. The representative of Tupaj Amaru made the following alternative proposal regarding Article 3:
- “Article 3. Prevent misappropriation. The prohibition would apply to the following illicit acts as referred to in this Article: (a) the reproduction, distribution, communicating to the public, making available, rental, including still photography of TCEs/EoFs without the prior informed consent of the holders; (b) any use of TCEs/EoFs or adaptations thereof to the prejudice of the interests of indigenous peoples and local communities who are the legitimate holders of this cultural heritage; (c) any deformation, modification, or acts of bad faith with a view to damaging, offending, or causing prejudice to the reputation and cultural identity of the indigenous people or the local community, irrespective of where they live. Any fraudulent acquisition or abuse of IP rights concerning TCEs/EoFs should be punishable. Article 3 bis. (a) Indigenous people or Local Communities shall have the rights to IP over all tangible and intangible works. (b) Any deformation, mutilation or modification of TCEs/EoFs shall be prohibited and offenders shall be suited in civil and criminal courts. (c) Any false, confusing or misleading allegations with a view to using TCEs/EoFs for commercial means without the prior informed consent of the holders shall be subject to criminal or civil sanctions.”*
165. The Delegation of India expressed serious concern regarding paragraph (e) of the New Zealand proposal and suggested replacing the word “enable” by “ensure that” and adding, after the words “local communities”, the words “shall have exclusive and inalienable collective rights to authorize”.
166. The representative of INBRAPI considered the proposal made by the Delegation of New Zealand and suggested replacing the word “acknowledgment” in paragraph (b) with the words “prior informed

- consent". She also requested that the words "indigenous peoples and local communities" be kept in the proposal and opposed the proposals made by the Delegation of the EU and its Member States in this regard.
167. The representative of LCA referred to the proposal made by the Delegation of New Zealand and suggested that the words "to the extent the legal system permits it" be added at the end of paragraph (c).
 168. The Delegation of Barbados referred to the way in which the beneficiaries should be designated. It moved from the idea of "nations" and proposed that "small island developing states" be added after "local communities".
 169. The Chair opened the floor for comments on Article 4.
 170. The Delegation of Canada referred to the relationship between Articles 4 and 3 and the fact that the discussion regarding Article 3 had not been conclusive. It was therefore premature to look at Article 4 in any detail. Having said that, it considered in general terms that it would be very important to make Article 4 as flexible as possible, so that Member States could manage the rights under their national legislation. It reminded the Committee that its country was organized as a federation and that this situation had consequences on the ability of the government to manage rights.
 171. The Delegation of New Zealand supported the consideration of the text as submitted by the IWG on the management of rights as a new starting point and commended its simplicity. The management of any rights should be in the interest of the beneficiaries. There should be flexibility around the concept of "competent authority" and expressed preference for this term instead of the words "national authority" or "agency" which were used in document WIPO/GRTKF/IC/17/4. There might not necessarily be one competent authority only. Its suggested amendments were, in paragraph 1, in the fourth line and in paragraph 2 to replace the reference to "the competent authority" with "a competent authority". Regarding paragraph 2, it suggested to replace the last word of the first line, which is "shall", by "may", in order to provide greater flexibility and match the functions of the competent authorities with national approaches and systems.
 172. The Delegation of the Islamic Republic of Iran suggested adding the word "national" after the word "designated" in the second line of paragraph 1. It proposed to add "in accordance with the national law" after "beneficiaries" in the same paragraph and to delete the word "only" in the subsequent sub-paragraph (a). In the same sub-paragraph, it suggested replacing the words "in accordance with the traditional decision-making and governance processes" by the words "in accordance with the national procedure".
 173. The Delegation of the EU and its Member States requested that the word "shall" be replaced by "should" throughout the draft Article. It also suggested that the following paragraph 3 be added: "The competent authority shall report to WIPO, each year and in a transparent way, on the distribution of benefits arising from the use of TCEs". This reporting would be to the benefit of beneficiaries.
 174. The representative of FILAIE reminded the Committee that some indigenous peoples might be nomads and live in various territories. It suggested that the competent authority in those cases be the one that was relevant for the territory where those indigenous peoples lived for most of the year.
 175. The representative of Tupaj Amaru opposed the suggestion made by Delegation of Belgium, on behalf of the EU and its Member States, that aimed at replacing "shall" by "should".
 176. The representative of KEI suggested the following language in a new paragraph 3 as follows: "The management of the financial aspects of the rights should be subject to transparency, concerning the sources and amounts of money collected, the expenditures, if any, to administer the rights, and the distribution of money to beneficiaries."
 177. The representative of CISA wondered whether there would be international oversight of the protection process, regarding in particular Articles 2 and 4. He asked who was going to designate the "designated authority" that was referred to in paragraph 1. Referring to the suggestion made by the Delegation of the Islamic Republic of Iran to delete "in accordance with their traditional decision-making and governance processes" in paragraph 1, sub-paragraph (a), he stated that this stripped indigenous peoples of their rights. He expressed serious concerns about "the reduction to national legislation" that he was witnessing.

178. The Delegation of India expressed two major concerns regarding Article 4. There was no conclusion yet about the beneficiaries under Article 2. If Option 2 were to be adopted for this Article, the management of rights might be impacted accordingly. The Delegation reserved its comments for later but suggested at this stage qualifying the word "management" in the title of Article 4 with the word "collective". Regarding paragraph 1 of Article 4, it proposed again to add the word "collective" before "management" and to delete all the rest of the paragraph. It argued that the right to manage the collective rights given to communities must rest with them. It added that in case the beneficiaries were expanded or could not be identified, it might be necessary to look into how the management of rights would be organized.
179. The Delegation of Switzerland stated that Article 4 provided a good basis for further work. Joining the Delegation of New Zealand, it was of the view that the management of rights should rest with indigenous peoples and local communities or any competent authority that those peoples or communities would mandate for such purpose. It was willing to consider the proposal made by the Delegation of the EU and its Member States concerning a reporting mechanism. It suggested replacing the words "for their benefits" with the words "for the direct benefit of relevant beneficiaries" to enhance clarity in the draft.
180. The Delegation of Algeria supported the proposal made by the Islamic Republic of Iran regarding paragraph 1, subparagraph (a) that aimed at replacing the term "their traditional decision-making and governance processes" with "national procedure". It requested that the words "and the preservation of TCEs/EoFs" be added at the end of paragraph 1, subparagraph (b).
181. The Delegation of Mexico expressed its agreement with the draft of Article 4 in general terms. It nevertheless proposed to delete the words "for example, regional, national, or local" in the paragraph 1, and to include in that paragraph, under sub-paragraph (a) and after the word "granted" the words "to a user by the designated competent authority". It also suggested that in paragraph 1, under sub-paragraph (b) the word "designated" after the words "be provided directly by the" be included.
182. The representative of INBRAPI supported the Delegation of South Africa that had expressed concerns about drafting amendments that lead to a substantial weakening of the text. She referred to international instruments which looked good on paper, but which were not effective because of their non-mandatory character. She made an appeal to Member States to show solidarity and maintain a text that would be mandatory. Regarding paragraph 1, subparagraph (a), she opposed the deletion of the words "traditional decision-making and governance processes" from the text, since this would be incompatible with the Constitution of Brazil that recognized the social organizations and the uses and customs of indigenous peoples. She proposed instead to add the words "customary rights and" before the words "traditional processes". She invited the Delegation of Brazil to support her proposal.
183. The representative of FAIRA agreed that the management of rights should rest with the beneficiaries, but wished that the text reflected the case where beneficiaries would delegate a competent authority. He referred to the proposal made by the Delegation of India regarding paragraph 1 and suggested that after the words "Article 2", a sentence be added with the words "Where the beneficiaries delegate to a competent authority, be it regional, national, local and acting at the request of and on behalf of the beneficiary, authorizations may be granted by the competent authority." He proposed also that subparagraphs (a) and (b) in paragraph 1 be inserted as sub-paragraphs in paragraph 2. He invited Member States to consider this proposal.
184. The representative of LCA suggested that a new sub-paragraph (e) be added under paragraph 2 with those words: "establish and maintain a database or registry of TCE/EoFs, accessible only to those chosen by the beneficiaries".
185. The representative of the Assembly of Armenians of Western Armenia expressed concerns regarding the way in which Article 4 was evolving. He pointed out that many Member States challenged the very existence of indigenous peoples who were rights holders and stated that other bodies, like the European Parliament, even considered that indigenous peoples had no rights compared to States. He requested in this context that the management of rights should rest with the beneficiaries only.
186. The Delegation of South Africa opposed the suggestion made by the Delegation of the EU and its Member States regarding the addition of a new paragraph 3 that created, in its view, an unnecessary burden on the beneficiaries. It expressed instead a preference for the alternative suggestion made by the representative of KEI. Regarding the suggestion made by the representative of LCA on the

- creation of databases, it stated that while it recognized that databases might be necessary to manage the rights, the Committee should limit these kinds of new inputs or exercise caution in constructing those in order not to create new burdens on the beneficiaries.
187. The Delegation of USA joined the Delegation of South Africa by endorsing the proposal made by the representative of KEI regarding a new paragraph 3.
 188. The Delegation of Kenya invited again the Delegation of Belgium, on behalf of the EU and its Member States, to explain why it kept insisting on substituting the word "shall" to "should". It could not find the word "should" in the many international instruments that it had examined. It stated that Article 4 as drafted by the IWG captured the whole essence of the management of rights and encompassed what the African Group had drafted in its original document. It therefore requested that Article 4 stand as it was submitted by IWG 1.
 189. The Delegation of Indonesia suggested that the word "or" be replaced by "and" in paragraph 1, sub-paragraph (b).
 190. The Delegation of the Bolivarian Republic of Venezuela supported the proposal made by the representative of INBRAPI regarding paragraph 1, sub-paragraph (b), since it brought the draft into line with the law of its country.
 191. The Delegation of Jamaica supported the intervention made by the representative of CISA regarding the fact that the words "their traditional decision-making and government process" should be kept in paragraph 1, sub-paragraph (a). It suggested also that the words "in accordance with international law" be added to those words.
 192. The Delegation of Cameroon supported the suggestions made by the Delegation of Jamaica. It invited the Committee to take into account the realities and circumstances of each country in defining the competent authority and to keep therefore the draft as flexible as possible. It pointed out that the draft needed to avoid redundancy when it referred to beneficiaries and the preservation of their rights. It also referred to delegations who reserved their rights on Article 4 because of the fact that there was no consensus yet on the beneficiaries. It was concerned that the present session of the Committee had only addressed four articles related to TCEs.
 193. The Chair opened the floor for comments on Article 5.
 194. The Delegation of USA suggested adding a new paragraph that would be parallel to paragraph 2, but different, with the following words: "To the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of TCE/EoF, provided such exceptions to the protection of TCE/EoF are limited to certain special cases that do not conflict with the normal utilization of the TCE/EoF by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries." It argued that paragraph 2 permitted national laws to create exceptions for TCE/EoF pursuant to a three-step test parallel to the tests that existed for other forms of IP. Its proposal required that if an exception existed in copyright law or trademark law, it would be necessary to have a parallel and co-extensive referral to the TCEs/EoFs.
 195. The Delegation of Colombia suggested that in the English version of the draft, in paragraph, sub-paragraph (a), the words "and between the communities" be added after the word "within" and that the words "the traditional and customary context by members of the IPLC" be deleted.
 196. The Delegation of Australia stated that exceptions in Article 5 should be provided for living indigenous and traditional cultures in order for them to freely develop new forms and expressions. It particularly referred to aboriginal artists who developed a new artistic trend in its country during the last century. It wondered whether the wording of the paragraph was sufficiently flexible to deal fully with new forms of cultural expressions and was attracted therefore by some form of words as proposed in the additional paragraph 3, subparagraph (b).
 197. The Delegation of Switzerland stated that it was crucial to balance the collective rights and interests of indigenous and local communities on the one hand and the rights and interests of individual authors on the other hand. It thanked the other delegations for their proposals and said that it would reflect on them before being able to react. It referred to paragraph 1, subparagraph (a) and proposed to include the word "creation" after the word "normal". It supported also the proposal made by the Delegation of Colombia regarding this subparagraph. It wished that the instrument did not restrict the sharing of

- TCEs/EoFs among communities and drew the attention of the Committee to Article 12.4 of the Nagoya Protocol which addressed this issue.
198. The Delegation of India referred to the proposal made by the Delegation of USA saying that it reserved its right to reflect on it and react, since this proposal seemed to have many implications on how cultural expressions and limitations in this field would interact with existing copyright and trademark laws. It referred to paragraph 3, as a “proposed addition”, sub-paragraph (b) and noted that the Delegation of Australia made also reference to it. It stated that it looked very broad in scope and had the potential to convert TCEs to private property through copyright and trademark law. It therefore proposed that this sub-paragraph be qualified in order to make sure that the envisaged exception benefited only the beneficiaries or be controlled by them. In this context, it proposed that the words “by the beneficiaries or in association with them” be added after the word “authorship”. It would mean that the rights associated with the new forms or expressions would still belong to the communities and would be collectively managed by the communities, rather than be privatized. It added that exceptions and limitations should be permissible provided they facilitated adding value to collective ownership and collective management.
 199. The representative of the Tulalip Tribes referred to the proposal made by the Delegation of USA. He expressed concerns, since some items that fell under copyright, trademark law or other forms of existing protection were actually symbols, ideas or TCEs that were very sacred or of significant spiritual value to indigenous peoples. He considered that it was problematic to legitimize such protection by international law. He considered that the words “not unreasonably prejudice the legitimate interests of the beneficiaries” in paragraph 2 had no clear meaning. He suggested adding after the word “beneficiaries” in the same paragraph the words “and that such uses do not violate their customary laws or community protocols”. It stated again that that any exceptions or protections must pay attention to the laws of indigenous people and local communities, since they were the core beneficiaries of the whole drafting exercise.
 200. The representative of INBRAPI agreed with the statement made by the Delegation of India regarding the paragraph 3, sub-paragraph (b), as a “proposed addition”. She stated that such paragraph could be prejudicial for the rights holders of TCEs/EoFs. In order to avoid any dangerous interpretation of that paragraph, she proposed to add in the chapeau of paragraph 3 the words “on the basis of the prior informed consent of indigenous peoples and local communities”. She said that this proposal would bring the draft into line with international agreements that were relevant for the specific rights of indigenous peoples and would prevent further misappropriation or misuse of TCEs/EoFs.
 201. The representative of CISA reiterated his concern with the way in which the beneficiaries were defined. His proposal regarding Article 4 should also apply to Article 5, paragraph 2, since national legislation was not the sole means for creating exceptions or limitations.
 202. The representative of SIEF highlighted the fact that a great deal of language that was used in the discussion came out of academic research and out of a long history of scholarship. He argued that the forthcoming instrument should encourage and enable responsible research and scholarship for the benefit of all, including indigenous peoples and local communities. He suggested therefore that the words “for non-commercial academic research” be added after the words “incidental uses” in the “proposed addition”.
 203. The Delegation of Canada, regarding paragraph 1, sub-paragraph (a), proposed that the words “normal” and “development” be deleted for being unclear or too broad. It also suggested that the wording after “IPLC” be also deleted and replaced with “consistent with domestic laws of the member states”, in line with Objective 6. Under paragraph 1, subparagraph (b), it suggested deleting the words “outside the membership of beneficiary community” in order to avoid redundancy. Under paragraph 2, it proposed that the word “national” be replaced with “domestic”. It stated also that the words “legitimate interests” were unclear and wondered how such interests would be determined and by whom.
 204. The Delegation of South Africa suggested deleting the “proposed addition” under Article 5 since it introduced exceptions and limitations that were too broad, unclearly formulated, intrusive and burdensome to indigenous and local communities. It also invited the Committee to reconsider the exceptions and limitations, make an enumeration of them and reconsider their formulation with more precision, taking the example of the new exception that was suggested by the representative of SIEF. It also argued against reflecting in the field of TCEs protection the exceptions and limitations that

- corresponded to copyright and trademarks.
205. The Delegation of Algeria stated that the word "beneficiaries" throughout Article 5 should be brought into line with Article 2.
 206. The Delegation of Kenya noted that the formulation of this Article was complicated because of its linkage with Article 3 on which there was no consensus yet. It added that the exceptions and limitations regarding TCEs/EoFs protection should be considered in the specific context of customary practices and be submitted to prior consent where appropriate. It invited the Committee to take into consideration the comments made by the representative of Tulalip Tribes in this regard. It expressed its discomfort with the "proposed addition" and reserved the right to come back to the proposal made by the Delegation of USA.
 207. The Delegation of Mexico supported the proposal made by the Delegation of Switzerland regarding the word "normal" that would be replaced by the word "creation" in paragraph 1, sub-paragraph (a). It suggested deleting the words "by members" and joined the Delegations of Colombia and Switzerland regarding the insertion of the words "and between communities" after the word "within" in the same sub-paragraph. It requested that the "proposed addition" be deleted and perhaps included somewhere else in the draft.
 208. The Delegation of the Russian Federation expressed its support for the draft of Article 5, including the "proposed addition", as submitted by the IWG. It said that those provisions aimed at ensuring a balance between the interests of the beneficiaries and those of society.
 209. The Delegation of New Zealand stated that the draft text from IWG 1 could be further refined. It referred first to its experience in developing national legislation that proved that the three-step test in implementing exceptions and limitations could be difficult to apply. References to fair practice and moral rights in the original version of Article 5 derived from relevant policy considerations. It therefore suggested replacing paragraph 2 with the following words: "Parties may adopt appropriate limitations or exceptions, provided that the use of TCEs/EoFs is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community."
 210. The Delegation of USA explained that its proposal sought to make coterminous, parallel and equal the exceptions that related to copyright law and the protection of TCEs/EoFs, or, in the case of symbols or signs, the protection of trademark law and the exceptions it created and the protection of TCEs/EoFs. Of the 184 Member States of WIPO, 128 countries had exceptions in their copyright law for libraries, 57 countries for persons who were blind or had other disabilities. It referred to the debates that were being conducted in the SCCR in an effort to craft international legal norms on exceptions for persons with print disabilities, libraries, archives and education. It stated that this would be an effort for naught to craft such norms in relation to copyright if the same exceptions did not apply to the protection of TCEs/EoFs. It also made an addition to its own proposal aiming at addressing an issue that was raised at the IWG as well as at the International Symposium in November 2010 in Saint Petersburg, regarding the concern that the exceptions as drafted did not apply in the same way to secret TCEs/EoFs. The proposal it made would therefore begin with the following words: "Except for the protection of secret TCEs/EoFs against disclosure". It said that this proposal was to highlight that the Committee should recognize that a much more narrow range of exceptions, if any, would apply to secret TCEs/EoFs.
 211. The Delegation of Colombia confirmed that it wished to insert the words "and between communities" in paragraph 1, sub-paragraph (a), after the word "within". It additionally suggested replacing the word "normal" with the word "customary". Consequently it said that the words "the traditional and customary context by members" could be deleted.
 212. The Delegation of Belgium, on behalf of the EU and its Member States, explained the rationale behind the replacement of the word "shall" with "should". It recalled that the Committee had to keep in mind that it was working on the draft without prejudice to the final form of the text. Since the Committee did not know what form the text would eventually have, it was of the view that it was preferable to keep the options open by keeping "should" as opposed to "shall", which was, as some delegations and representatives of observers recognized, appropriate for treaty language. Regarding the present draft of Article 5, it concurred with the proposal made by the Delegation of USA up to the words "prohibited by the protection of TCEs/EoFs", while the following words should be deleted. Regarding paragraph

- 2, it proposed to add the words “in accordance with the Berne Convention and the WCT, to provide exceptions and/or”. In reference to the “proposed addition” and its sub-paragraph (b), it suggested beginning with the words “the creation of”. Referring to concerns expressed by delegations and representatives of observers regarding this sub-paragraph, it reminded them that the wording came from Section 4.1 (iii) of the 1982 Model Provisions.
213. The representative of CAPAJ recognized the efforts made to come up with a text that took into account that the creations of the indigenous peoples were dynamic. He said that indigenous peoples improved TCEs/EoFs by using them. He suggested adding a provision in paragraph 2 that would prevent national legislation from obstructing the dynamic nature of the creations of the indigenous peoples. He therefore supported the proposal made by the Delegation of Switzerland to add “creation” in paragraph 1, sub-paragraph (a).
214. The Delegation of the Islamic Republic of Iran proposed that in Article 5 the acronym “IPLC” be replaced with “Beneficiaries”, in order to maintain consistency throughout the text.
215. The Chair invited comments on Article 6.
216. The Delegation of Belgium, on behalf of the EU and its Member States, supported Option 3 of Article 6, subject to a minor drafting change in paragraph 2, which should read: “At least as regards the economic aspect of TCEs/EoF, their protection should be limited in time.” The phrase “are concerned” should be deleted.
217. The Delegation of India expressed support for Option 2 of Article 6 and proposed a new paragraph be included, which would read: “Secret TCEs shall enjoy the protection given to disclosed TCEs as long as they continue to meet the criteria for protection under Article 1.” This would allow secret TCEs to continue to be protected, whether or not it might have been disclosed, in the same way as disclosed TCEs, provided that the TCEs would comply with the requirements in Article 1. Option 1 was deemed not valid, as it was based on the scope of protection in WIPO/GRTKF/IC/17/4. The scope of protection was now changing, which may exclude the question of registration. The Delegation had reservations on Option 3.
218. The Delegation of Australia supported the proposal made by the Delegation of India. Option 1 of Article 6 was deemed no longer relevant, given the changes made in the text and should be deleted. It agreed with the continuation of time in which the criteria was made.
219. The representative of MBOSCUDA suggested that in paragraph 2 of Option 2 of Article 6, the word “region” be replaced with “land”.
220. The Delegation of Indonesia expressed its support for option 2 of Article 6.
221. Without prejudice as to the choice between Options 2 and 3 of Article 6, the Delegation of USA joined Australia and India in expressing that Option 1 be deleted. Also without prejudice, it joined the Delegation of Australia in supporting the proposal made by the Delegation of India.
222. The representative of Tupaj Amaru proposed an alternative text for Article 6 on the term of protection:
- “The protection granted by this instrument to TCEs shall endure for the duration of the lives of the indigenous peoples and local communities as described in Article 1. (A) the protection of TCEs should endure throughout the lives of their holders and for as long as this cultural heritage has not been made available to the public domain. (B) the protection granted for TCEs described as secret, spiritual and sacred, shall endure for as long as it remains the history and heritage of indigenous peoples. (C) the protection granted to TCEs against any distortion, mutilation, or other infringement with the aim of causing harm to the memory, history, or image of indigenous peoples and local communities shall last indefinitely.”* On the issue of transmission of TCEs from one generation to the next, he noted that as custodians of TCEs, indigenous peoples and local communities passed on their TCEs before they were deceased, otherwise, the TCEs would have no longer existed.
223. The Delegation of South Africa expressed its support for Option 2 of Article 6.
224. The Delegation of the Islamic Republic of Iran supported Option 2 of Article 6. The living nature of TCEs should not be forgotten, and with this in mind, it could only accept an indefinite term of protection for TCEs.
225. The representative of the Assembly of Armenians of Western Armenia stated that an indefinite term of

- protection should be extended to TCEs.
226. The representative of GRTKF International referred to paragraph 2 of Option 2 of Article 6, which stated that “the protection granted to TCEs against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities”. The representative sought clarification as to what was meant by “the community”.
 227. The Delegation of Mexico supported Option 2 of Article 6, and proposed that a new paragraph be added, referring to secret TCEs covered in the original Article 6 in WIPO/GRTKF/IC/17/4, which read: “Insofar as secret TCEs, the protection as such shall endure for so long as they remain secret.” This paragraph would allow the deletion of Option 3.
 228. The Delegation of Angola, on behalf of the African Group, stated that the African Group position was consistent with the statement made by the Delegation of South Africa, which supported Option 2 of Article 6.
 229. The representative of CISA stated that irrespective of TCEs being secret or disclosed, the TCEs would still belong to the communities.
 230. The Delegation of Egypt supported the statement made by the African Group regarding Option 2 of Article 6. In addition, the protection of TCEs should be protected for an indefinite period.
 231. In examining the three options in Article 6, the Delegation of Singapore stated that the main idea was to protect TCEs against distortion and mutilation, which should last in perpetuity. Economic rights should, however, have a limited term. One question raised was how distortion would be defined, as the line between distortion and original inspiration may be blurred. The Delegation referred to the glossary to be prepared for next session and proposed that a definition of distortion be included.
 232. The Delegation of Nigeria supported Option 2 of Article 6 as originally formulated by IWG 1. It questioned the value of the new insertions. For instance, whether a TCE was secret or not, so long as it remained a TCE, it should be protected as stated in Option 2. The Delegation sought clarification on the purpose of the new paragraph in Option 2 as proposed by the Delegation of India. It recommended that Option 2 be limited to the two paragraphs as originally formulated.
 233. The Delegation of India clarified the purpose of its proposed paragraph. No reference was made in the IWG 1 text to the protection of secret TCEs which could have been disclosed. Such disclosure could have been done by the communities or third parties. In both cases, upon disclosure, the TCEs should continue to receive the same protection enjoyed by other forms of TCEs.
 234. The representative of CAPAJ stated that paragraph 2 of Option 2 of Article 6 referred to the damage caused to the image and reputation of communities and indigenous peoples. Protection should be indefinite against such harmful acts. He proposed that the word “their” be included in the phrase “indigenous peoples and communities”. The phrase would then read: “indigenous peoples and their communities”.
 235. The representative of BGC supported Option 2 of Article 6, and sought clarification as to why the term “community” was included in the phrase “community, indigenous peoples and communities” at paragraph 2. The representative proposed that “community” be placed in brackets. Furthermore, he proposed that the term “indigenous peoples” be written with capital “I” and capital “P” throughout the text for uniformity.
 236. The Delegation of Nigeria had reservations on the new paragraph proposed by the Delegation of India in Option 2 of Article 6 and proposed that the phrase “continue to” be inserted between “shall” and “enjoy”, so as to read: “shall continue to enjoy”, which could better express the continuity of that expression.
 237. The Chair invited comments on Article 7.
 238. The Delegation of India supported Article 7, and proposed that the term “national authorities” be replaced with “Beneficiaries under Article 2”.
 239. The Delegation of Angola, on behalf of the African Group, recommended that Article 7 be adopted by the Committee, with the amendment made by the Delegation India.
 240. The representative of INBRAPI expressed her concerns on the idea of registers in the second line of

Article 7, as it may differ from country to country. Maintaining TCE registers could give rise to the misuse of the public domain, and should be subject to the PIC of the indigenous peoples and local communities. She proposed that the following be added at the end of the second sentence: “on the basis of the prior informed consent of indigenous peoples and local communities, rights holders of TCEs/EoF”.

241. The representative of the Tulalip Tribes aligned himself with the statement made by the representative of INBRAPI. Any registers should be maintained with the prior consent of the indigenous peoples and local communities.
242. The Delegation of Switzerland supported the comments made by the representative of Tulalip Tribes and INBRAPI, respectively. As a registry was not a condition for the protection of TCEs, the second sentence of Article 7 should reflect that registries were declaratory and subject to the prior informed consent of indigenous and local communities.
243. The Delegation of Canada wished to ensure flexibility for the Member States to decide on formalities. The current text in Article 7 read that national authorities may maintain registries. This may differ from country to country. As long as the word “may” was included, it could go along with the wordings. It also stressed the need for Member States to decide on how they would proceed with respect to formalities.
244. The representative of FAIRA pointed out that the management of databases addressed in Article 7 on formalities should fall under the scope of Article 4 on the management of rights. Should reference be made to databases, this should be incorporated as a function of the competent authorities.
245. The Delegation of Egypt supported the statement made by the Delegation of Canada. References should be made to “national authorities” as well as to “registries”. The possibility to maintain registries by national authorities was important. Agreement should be made on this in relation to the protection of TCEs and TK, and this would put an end to the registration of rights or other formalities.
246. The representative of Tupaj Amaru proposed to add the words “on the basis of the prior informed consent of the indigenous peoples and local communities”.
247. The Delegation of Indonesia expressed support for the proposal made by the Delegation of India to insert the word “beneficiaries”, as well as that of the Delegation of Switzerland with regard to “declaratory registers or other records”. It sought guidance as to whether the English term should be “declaratory registers” or “declaratory registrations”.
248. Bearing in mind that some TCEs could be secret, the Delegation of Colombia stated that registers could be established to maintain the confidentiality of those TCEs when so requested by the communities.
249. The Delegation of Senegal supported Article 7 and stated that other registration entities could maintain records.
250. The Chair invited comments on Article 8.
251. The Delegation of Indonesia expressed support for Option 3 of Article 8. Option 3 resembled a comprehensive approach in that it included reference to national law as well as covered the context of international cooperation. Option 3 also provided that any criminalization could be addressed by the national law. Further, it wanted to make sure that there was consistency between this Article and Article 2 on beneficiaries.
252. The Delegation of Belgium, on behalf of the EU and its Member States, supported Option 1 of Article 8 and suggested to insert a new paragraph 2, as follows: “Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries.”
253. The Delegation of Angola, on behalf of the African Group, expressed support for Option 3 of Article 8, as the position of the African Group. It also supported the inclusion of the Article on transboundary cooperation.
254. The representative of CAPAJ raised the issue of transboundary indigenous peoples. In such situations, there would be a need for a *sui generis* register for the indigenous peoples. The representative would not agree with deleting Article 8 and, instead, there should be a new Article 12

- on transboundary cooperation. In addition, there should be a special Article to guarantee the rights already enshrined in other international instruments.
255. The representative of the Brazzaville and Congolese Association expressed support for Option 3 of Article 8. A case in point was the pygmies who lived in six countries of the Congo basin, including Congo, Gabon, Cameroon, and the Peoples Republic of Congo.
 256. The representative of the ICC commented on the drafting proposal by the Delegation of Belgium, on behalf of the EU and its Member States, which read: “against the willful, negligent infringement”. He sought clarification as to whether it should state “willful and negligent” or “willful or negligent” or “willfully negligent”, as there was a considerable difference between the possible meanings.
 257. Without prejudice to the nature of the instrument being discussed in the Committee, the Delegation of Canada expressed support for Option 1 of Article 8 and proposed to add “as appropriate and in accordance with their legal system”, after the phrase “to adopt”. It also proposed to delete the word “necessary” so that it would read “measures to ensure the application of this instrument”.
 258. The Delegation of South Africa supported Option 3 of Article 8 as a comprehensive base. Referring to paragraph 4 of Option 3, it proposed to rephrase it as follows: “where TCEs are shared by different countries or by indigenous peoples in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of the enforcement measures provided under this instrument.”
 259. The Delegation of New Zealand supported Option 1 of Article 8, along with the drafting proposal made by the Delegation of Canada.
 260. The Delegation of Belgium, on behalf of the EU and its Member States, in response to the query from the representative of ICC confirmed that the correct wording should be “willful or negligent”.
 261. The representative of FAIRA expressed support for Option 2 of Article 8 and referred to Article 40 of the UNDRIP. The representative also expressed support for paragraph 2 of Option 3, where a competent authority could be tasked with the role of advising beneficiaries.
 262. The representative of CISA referred to the text “legislation of the country” in paragraph 3 of Option 3, and advised that it be replaced with the word “beneficiaries”. This would also apply to other articles, which referred to “free prior informed consent”. The representative expressed support for option 3 of Article 8 and referred to the final report of Miguel Alfonso Martinez, and specifically, to the proposal made by the Delegation of Canada on law and policy, which was perceived as being discriminative.
 263. The representative of ARIPO generally supported Option 3 of Article 8 and was of the view that the Article on transboundary cooperation should also be taken into account. In the original framework, there was a provision by State parties to ensure that issues related to transboundary TCEs were taken onboard. A proposal could be to consider paragraph 4 of option 3 as a separate Article on transboundary cooperation, with appropriate references to be made in Articles 4 and 7. For instance, Article 7 dealt with the registration of TCEs. Should transboundary TCEs be taken on board, this would have a bearing on the registrations of TCEs. Lastly, with regard to managing bodies, there could be a need to use a more generic term, such as designated authorities instead of national authorities, as proposed in the text, which would take care of transboundary cases on behalf of States party to regional organizations, such as ARIPO or OAPI.
 264. The Delegation of Kenya supported Option 3 as the basis of discussions on Article 8.
 265. The Delegation of USA supported Option 1 of Article 8 and the proposed paragraph by the Delegation of Belgium, on behalf of the EU and its Member States. It proposed to insert additional wording at the end of the proposed paragraph after “beneficiaries”, that would read: “sufficient to constitute a deterrent to further infringements”. This wording would create a parallelism with existing language on enforcement in the WPPT and WCT.
 266. The Delegation of Nigeria supported Option 3 of Article 8, and the amendments suggested by the Delegation of South Africa. It agreed with the representative of ARIPO that it could be useful to use generic terms that would allow regional bodies to act as competent authorities in cases of transboundary cooperation.
 267. The Delegation of Mexico believed that the three options were not mutually exclusive and could support these. Option 1 was a general principle for application and an umbrella for the measures

- outlined in Article 8. In the same way, Option 2 was related to measures on misappropriation and this should remain in the text. In regard to Option 3, the measures of compensation or remedies were adequate. The Delegation proposed that the square brackets around "designated competent authority" be deleted in paragraph 2 of Option 3.
268. The representative of INBRAPI stated that the options were mutually exclusive. An Article could be created, which could include all of them. The representative expressed concerns regarding Option 3, supported by the African Group. Option 3 spurred talks on enforcement and dispute resolution mechanisms, and criminal and civil remedies, and the representative was concerned that the burden of proof could be too much for the indigenous peoples and local communities, as remedies may not always be accessible to them. She proposed to add the following at the end of paragraph 1 of Option 3: "ensure the inversion of the burden of proof in favor of the indigenous people and local communities." Often the institutions that infringed cultural rights were legally and economically stronger and had easier access to justice. She requested that Member States that had expressed concerns over the burden of proof, support her proposal.
269. The representative of the Assembly of Armenians of Western Armenia stated that Options 2 and 3 were actually complementary. The representative supported the amendment by the representative of CISA in paragraph 3 of Option 3, as the wording "legislation of the country" limited the right of appeal of the rights holders and this should be guaranteed.
270. The Delegation of Australia supported a form of words in the Article that was consistent with other international IP instruments and that recognized that the subject matter being dealt with was TCEs. There was a need to be proportionate with regard to registries. Indigenous people could look for infringements of their rights, which could be answered with no more than an apology in many cases. It thought that the flexibility and consistency was best provided in Article 1, as amended in the discussion.
271. The Delegation of Belgium, on behalf of the EU and its Member States, proposed that an Article 8*bis* on dispute mechanism be included. The Committee should consider that TCEs were not always created as the expression of distinct local identities, nor were they often truly unique. They were the products of cross cultural exchange and influence. Within one community the name or designation may vary in different frontiers. Therefore, it seemed important to think about a safeguard for the user or permission seeker in the Article. Where a given consent appeared to have been granted upon unjust grants or where the permission was given by the wrong community or person, there should be some sort of a safeguard for the user. It further suggested clear wording on Alternative Dispute Resolution, which concerned different types of disputes between beneficiaries or between beneficiaries and users of TCEs. In such a case, each party should be entitled to refer the issue to an independent and recognized alternative dispute resolution mechanism recognized by international and/or national law. In the footnote of the proposal, the WIPO Arbitration and Mediation Center was indicated as an example.
272. The representative of Tupaj Amaru supported the Delegation of South Africa with regard to Option 3 of Article 8 and proposed a new text for Article 8:
- "Contracting Parties undertake to adopt, in accordance with their respective legal systems and consistent with international instruments the measures necessary to ensure the application of this instrument. (1) In case of misappropriation of TCEs which are threatened with loss and under Article 3, contracting parties undertake to establish appropriate mechanisms for dispute resolution, appropriate civil, and criminal remedies and sanctions. (2) In accordance with Article 3, a competent body should be established after prior consultation with the indigenous peoples to provide advice and assistance to the beneficiaries mentioned in Article 2, to ensure enforcement of their rights, and the application of the sanctions covered in the present article. (3) Restitution and remuneration for the cultural heritage which has been used in violation of the rights that have been granted by the present instrument shall be governed by the legislation of the country in which the protection in question is being sought. (4) The contracting parties shall provide cooperation and assistance with the aim of facilitating the application of the mechanisms and measures for compliance, international territory and in border areas with neighboring countries as covered by this Article."*
273. The Chair reminded that proposals of observers would need to be supported by Member States.
274. The representative of GRTKF International supported the text as presented in paragraph 2 of Option 3

- of Article 8.
275. The Chair invited comments on Article 9.
276. The Delegation of Canada would not support calls for the renegotiation and possible invalidation of IP rights that could have been legitimately acquired before the coming into force of any international instrument for the protection of TCEs. The Committee should be seeking an approach to protect TCEs in a manner that would respect existing branches of IP. The IWG 1 text provided a good basis for moving forward on this issue. However, the text was still imperfect and the Committee should ensure that the progress made would not be jeopardized by the temptation to import concepts, language and issues in this instrument which were either not within the scope of WIPO or simply foreign to IP. It was important that the terms used in the text were generally understood in the IP context. For example, the PIC concept would not be applicable to all country situations and flexibility should be maintained to capture the concept of approval and consultation. Care should also be given to preserving the balance between the creators and users of TCEs. It had consistently advocated for clear objectives and principles for any instruments on TCEs and although the Committee had constructive discussions, the Committee should also discuss in the plenary the objectives and principles. This instrument would need to work for all concerned in order to be effective.
277. The Delegation of Belgium, on behalf of the EU and its Member States, supported Option 2 of Article 9. It noted that paragraph 2 of Option 2 provided very concise and precise text.
278. The representative of the ICC supported the statement made by the Delegation of Canada, particularly with regard to retrospectivity. He also took up the point that the Delegation of Canada had made about creating a balance between the creators and the users. It was essential to have a balanced system. This was reflected in the objectives and principles. It would not only help to merely agree on wording but also to get a convention, which members would happily sign and implement.
279. The Delegation of the Russian Federation supported option 2 of Article 9 for the reasons mentioned by the Delegation of Belgium, on behalf of the EU and its Member States.
280. The Delegation of Indonesia supported Option 1 of Article 9 as that context would be more suitable to the protection of TCEs.
281. The Delegation of Angola, on behalf of the African Group, expressed support of Option 3 of Article 9. It requested the possibility to confirm this support at a later stage.
282. The Delegation of South Africa supported Option 3 of Article 9. This Article was important, as probably 80% of Africa's TCEs had been taken to other countries for centuries. Some of the TCEs were critical to the cultural identities of the peoples of Africa. To that extent, if paragraph 3 of Option 3 did not provide for the recovery of such TCEs, Africa would be losing a whole wealth of treasury of the continent. The insistence by Africa on this issue was in line with other international conventions, such as UNESCO. It insisted that this was a significant issue at the international level and within the mandate of the Committee, when considering that volumes of African TCEs were taken away from the continent, for research, archiving, and record keeping.
283. The Delegation of USA aligned itself with the statement by the Delegation of Canada and expressed preference for Option 2 of Article 9. In regard to paragraph 3 of Option 3, the Delegation was concerned that it was unclear as to whether it referred to physical materials or whether it simply referred to abstract or intangible TCEs. Should it refer to physical materials, it was of the view that while repatriation was important and should be discussed with artwork and physical materials in museums and archives, it was certainly far beyond the realm of WIPO's activities.
284. The Delegation of Namibia aligned itself with the Delegation of South Africa in supporting Option 3 of Article 9. In so doing, it referred to the Vienna Convention on the Law of Treaties and observed very clear precedents when, for example, the Basel Convention came into force. There was therefore no contradiction or retroactivity in the provision. It thought that those calling for this retroactivity were actually muddying the waters with allegations that had no substance.
285. The representative of MBOSCUDA supported the Delegation of South Africa and others with regard to Option 3 of Article 9.
286. The representative of CAPAJ referred to the statement made by the USA that WIPO did not have the competence to deal with the restitution of specific items. The representative thought that, legally

- speaking, that argument did not hold water, because the WIPO General Assembly had mandated the Committee to develop an instrument for the protection of TCEs. One specific way of protecting TCEs was to ensure the possibility to recover tangible or intangible TCEs and to return them to their place of origin. The TCEs could have been taken to museums in USA, Germany, France, and UK. The Committee should have discussions on the repatriation of TCEs to the place of origin.
287. The Delegation of Angola, on behalf of the African Group, supported Option 3 of Article 9 for the reasons given by the Delegation of South Africa, which also reflected the African Group position. Option 3 included certain important issues, while Option 1 could be deleted.
288. The Delegation of Kenya supported the African Group position on paragraph 3 of Option 3 particularly because it functioned as a remedy and provided an opportunity to recover what was taken without the consent of the communities.
289. The Delegation of Ecuador supported Option 3 of Article 9. The work of the Committee was to precisely bring some order to a field, where previously there was none and which had not been properly dealt with by other instruments. It therefore believed that Option 3 was a better attempt to bring that order. Paragraph 1 would cover the future, whilst paragraph 2 would try to bring conformity to continuing practices, and paragraph 3 was extremely important so as to defend the cultural heritage of countries like Ecuador, which could have been affected.
290. The representative of GRTKF International expressed support for Option 3 of Article 9.
291. The representative of LCA expressed concerns regarding paragraph 3 of Option 3, which could remove substantial quantities of content from libraries. It may not be unique content but that perhaps could be found in scholarly journals and would hinder academic research in other ways. The representative understood that this was an issue.
292. The Delegation of Canada encouraged the Committee to make the necessary efforts to remain strictly within the purview of the mandate of WIPO. The question of the restitution of cultural artifacts was already governed by international treaties and dealt with by other international organizations, particularly UNESCO. With reference to its previous intervention on the PIC concept to be complemented by the concepts of approval and involvement, it specifically requested that, after every iteration of the term “prior informed consent” in the live drafting text, the words “approval and involvement” be added. Every such reference would then read: “prior informed consent or approval and involvement.”
293. The representative of the Tulalip Tribes supported Option 3 of Article 9. The representative believed that the concerns about protecting the rights of third parties were covered in paragraph 2 of Option 3. The rights of third party holders should be protected with no extra kind of conditions. It believed that the purpose was to regulate the uses of TCEs. This was very important to indigenous peoples and the peoples would in a blanket manner secure the rights of third parties with no kind of measures to bring these into conformance with customary laws. While respecting some of the rights of third parties, and once those rights had expired, what measures would be put in place. The representative was of the opinion that when the rights of third party had been exhausted, there should be repatriation back to the communities of the origin and to the TCE holders.
294. The Delegation of Cameroon reminded the Committee that it was trying to develop a *sui generis* protection system for TCEs, as conventional IP was not sufficient to provide the type of protection being sought. UNESCO provisions existed, but were also not adequate. It would not always be necessary to talk about an equilibrium between those who create and those who use. It would be like putting the rights of owners and the rights of users into the same scales.
295. The Delegation of USA stated that the repatriation of cultural artifacts was beyond the purview of the Committee and WIPO. It recalled that the Delegation of Angola had pointed out that there seemed to be no support for Option 1. The Chair could therefore ask if the Committee could eliminate Option 1 as a bold move to shorten the text. It should be recognized however that Option 1 in a way was a bridge between Options 2 and 3.
296. The Delegation of Australia recalled the statement made by Ecuador, and thought that there was possibly not one area but several areas that required better regulation. Of the several areas that could be better regulated was the particular area that the Committee was dealing with in relation to IP protection. It believed that the best approach to achieving consensus in the Committee on a better IP

system was to focus on the IP issues at hand. An IP system required that it take into account not only the potential new rights owners of TCEs but other public policy interests as they were equally valid. It noted that, within the context of paragraph 3 of Option 3, an agreement on a new form of IP for TCEs would in effect carry out the repatriation of those rights to the legitimate owners. Finally, the Delegation agreed with the proposal made by the Delegation of USA to delete Option 1, which would shorten the text. Further, it would support Option 2.

297. The Delegation of Nigeria favored Option 3. TCEs had been misappropriated for a long time and it was appropriate that the protection sought would address misappropriation in very clear terms and in a decisive manner. It appreciated the concerns of delegations that would want to secure flexibilities for users and holders. Such concerns could be properly addressed in Article 5 on exceptions and limitations. In supporting Option 3 of Article 9, the Delegation was mindful that this process was aimed at developing a *sui generis* regime with joint obligations. It also supported the deletion of Option 1.
298. The representative INBRAPI supported Option 3 of Article 9 and thought that especially paragraph 3 of Option 3 was a very important. In this regard, she asked who exactly would hold the rights, as the issue of beneficiaries had not yet been resolved. She proposed that after the phrase “that have special significance”, the phrase “for indigenous peoples and local communities” should be added, as they should have the rights over their TCEs. In light of the proposal made by the Delegation of Canada, it should be borne in mind that prior consent had to be consent that was informed. She reminded the Committee that Canada had ratified the UNDRIP this year and Article 40 specified that indigenous peoples should be involved in decision-making when those decisions would have an impact on their rights. There were three types of PIC in that context. For this reason, the issue of approval and the general participation of indigenous peoples in the whole process should be addressed. The proposed expression was not sufficiently precise. There was a need to ensure that indigenous peoples would have recourse from any infringements of their rights. In that regard, she wished to be fully in line with the provisions of other international instruments and care should be given to making the wording in the text appropriate.
299. The representative of Tupaj Amaru commented that the issue of recovery was very important for the survival of indigenous peoples.
300. The Chair invited comments on Article 10.
301. The Delegation of Angola, on behalf of the African Group, expressed support for Option 1 and noted that Options 2 and 3 contained valuable points.
302. The Delegation of Belgium, on behalf of the EU and its Member States, expressed preference for Option 2 of Article 10, subject to a typing correction being made in the second line, in which the word “of” should be deleted.
303. The representative of CAPAJ stated that Option 1 of Article 10 was supposed to be consistent with other existing provisions in international law, which dealt with issues of protection.
304. The Delegation of the Islamic Republic of Iran preferred Option 1 of Article 10 and proposed to delete “does not replace and” in the second line. In the third line, the Delegation proposed to insert “in accordance with international law” after the word “thereof”.
305. The representative of the ICC supported Option 2 of Article 10 following the amendment proposal made by the Delegation of Belgium, on behalf of the EU and its Member States. The representative pointed out that Option 3 was not clear, as it assumed that only one right could be relevant to a particular object, which was not the case.
306. The representative of the Tulalip Tribes expressed concern on the relationship of a *sui generis* regime for TCEs with other existing regimes. For example, copyright could already apply to TCEs, but remained insufficient to protect the TCEs of indigenous peoples and local communities. The main difference related to the issue of term of protection. Copyright protection provided for a limited term, in which at some point protection would expire and works would go in the public domain. If the Committee was creating a *sui generis* regime, should it be bound slavishly to conventions that had been negotiated prior to the involvement and participation of indigenous peoples and local communities or prior to sufficient consideration of their concerns?
307. The Delegation of Morocco supported the African Group position regarding Option 1 of Article 10 and proposed to replace the wording “these provisions” with “this instrument” in the first line.

308. The Delegation of Indonesia supported Option 1 of Article 10, which provided for complementarities to conventional IP protection that could be relevant to the protection accorded under this instrument.
309. The Delegation of the Bolivarian Republic of Venezuela believed that the intention was to provide protection to TCEs and this should not be done with a limited term of protection. The Delegation was of the opinion that international IP instruments should be scrutinized in this regard, before imposing restrictions on the protection of TCEs by limiting the term of protection to 20, 30 or 40 years. In other words, the exact opposite of copyright, patent or other IP protection with a specific time period was sought for TCEs. TCEs had been appropriated or misappropriated and the Committee was now trying to ensure that TCEs would be protected and that the knowledge and IP discussions concerned remain in place as they were before the misappropriation.
310. The Delegation of the Russian Federation expressed support for Option 2 of Article 10.
311. The Delegation of USA joined the Russian Federation in supporting Option 2 of Article 10.
312. The Delegation of Canada aligned itself with the Delegations of the Russian Federation, USA and Belgium, on behalf of the EU and its Member States, in supporting Option 2 of Article 10, which was also consistent with earlier comments made by the Delegation.
313. In view of comments made by previous speakers, the Delegation of Australia suggested that Option 3 be deleted to simplify the text in which it would support Option 2 of Article 10.
314. The representative of INBRAPI expressed her concerns on the position taken by some delegations, including the Russian Federation, USA, the ICC and the EU and its Member States. These delegations seemed to be suggesting that the draft text for the *sui generis* protection of TCEs should not in any way affect international IP protection. The representative questioned what the Committee's intention was, if not to cover some of the gaps which existed in the current international IP system and which allowed misappropriation of TCEs to occur. She thought the Committee was convened to provide some protection to the TCEs of indigenous peoples and local communities, and those people lived in many of the countries, which she referred to. With respect to solidarity with indigenous peoples and local communities, she urged the Committee to think about the rights of these peoples and the protection of their TCEs. There was a need for effective protection and this was not the way to do it.
315. The Delegation of Cameroon urged the Committee to move forward in finding specific solutions to the problems that the Committee was facing. If the Committee took the view that there was no complementary protection or that the special regulations being sought were intended to fill in gaps in the IP system, then what exactly was the Committee doing? In Cameroon, the Bamum people lost the throne of their sultan and the original of that throne was now in Germany. The Committee spoke about balance between creators and users. What is Cameroon's recourse in this particular case? Should the throne be divided up or should Germany just keep it as Cameroon had no right to claim it. What should be done about the said artifact?
316. The Delegation of Ethiopia supported the African Group position and proposed to insert "other relevant" before "legal instruments" in line 4 of Option 1 of Article 10. It also proposed to replace the word "programs" with "plans of action".
317. The representative of CIEM, on behalf of the Call of the Earth, stated that Option 1 was complementary to conventional IP rights. The TCEs of indigenous peoples should not be subject to a time limit. Option 3 was therefore complementary to Option 1. The representative suggested the insertion of the following text in Option 1: "Despite what is stipulated in this option, TCEs should be protected without time limit for the safeguard of the tangible and intangible cultural heritage of indigenous peoples."
318. The representative of the Assembly of Armenians of Western Armenia expressed support for Option 1 of Article 10, where there was an unspecified period of protection. With regard to Option 2, it was stated that protection should in no way affect the protection provided for in international legal instruments on IP rights. The representative believed that it actually should affect those provisions and proposed that the wording "in no way" be deleted.
319. The Delegation of the Bolivarian Republic of Venezuela supported the text proposal made by the representative of the Call of the Earth. Article 10 dealt with a time limit and the Delegation was not supportive of Option 2.

320. In supporting the position of the African Group, the Delegation of Kenya emphasized that Option 1 of Article 10 was more encompassing because it clearly stated the relationship that these particular provisions would have with the existing IP regime.
321. The Chair called for comments on Article 11.
322. The Delegation of Belgium, on behalf of the EU and its Member States, reserved its position on Article 11 as this Article depended on the final outcome of the negotiations in general.
323. The Delegation of Angola, on behalf of the African Group, noted that there seemed to be consensus on this text, and wondered whether the Committee could adopt it so as to make some progress. Should a regional group have a reservation, it could be said that the text was adopted but with reservations. Such practice was normal in the UN. Therefore, the Committee could adopt the text and state that the Delegation of Belgium, on behalf the EU and its Member States had a reservation.
324. The Chair clarified that the Committee would, at this time, not be formally adopting any articles, as many articles would depend on the final outcome of the negotiations, as explained by the Delegation of Belgium, on behalf of the EU and its Member States. The Chair stated that nothing was agreed until everything was agreed.
325. The Delegation of Canada supported the Chair in his statement.
326. The Delegation of Angola, on behalf of the African Group, accepted the Chair's principle on consensus. It thought that if the Committee could at least consolidate the articles that that could help to move forward. It understood that the Delegation of Belgium, on behalf of the EU and its Member States, had a reservation but thought that this could simply be noted and reflected in the document.
327. The Chair indicated that the Committee had completed its review of WIPO/GRTKF/IC/17/9. The document contained a number of options and alternative drafting proposals. The Committee now needed to decide on the way forward. For instance, how should the text evolve and be discussed further by the Committee at the upcoming IGC sessions. However, it was clear that the text should have fewer options and alternatives and a number of delegations already indicated which options should be deleted at this stage. The Chair proposed and received the approval of the Committee that an open-ended informal drafting group on TCEs be established. The objectives would be to examine the text on TCEs further and to clean the text as far as possible by reducing its length and complexity, and by reducing the number of options and alternative drafting proposals, especially where there were clear drafting issues. The informal drafting group should not add additional text at this stage. With regard to the substantive articles, the informal drafting group would not necessarily resolve the outstanding policy issues; these were for the Committee to resolve, but the informal drafting group should at least be able to identify any outstanding policy issues. To summarize, the informal drafting group would be tasked to: (i) reduce the number of options and alternatives in the text; and (ii) identify any significant outstanding policy issues. The goal would be to reduce the options to a maximum of two for each article. The informal drafting group would not be a decision-making body, and any text produced would have to be reviewed and adopted by the Committee in plenary. He said the informal drafting group would be invited to meet between Wednesday afternoon and Friday morning. A room with interpretation and computer would be made available. He further proposed that the drafting group could meet in parallel with the plenary, which would continue its discussion on the other agenda items. The drafting group would be chaired by the Vice Chair from Mexico, and it would elect a Rapporteur or co-Rapporteurs. The drafting group would be open to delegations and observers. Observers would participate in the same capacity as in the Committee. The drafting group would work on the English version of the text. With regard to the smaller drafting groups established earlier in the week, the Chair suggested that as soon as they reached a conclusion, they would report to the larger informal drafting group, in which case the larger informal drafting group would preferably not revisit the conclusions already reached by the smaller drafting groups. It would simply report and form part of the outcome of the work of the larger drafting group. The Secretariat would be on hand to assist the open-ended informal drafting group and to record the changes to the text, if the drafting group so wished. The text of the informal drafting group would be presented by the Rapporteur on the Friday morning plenary session. This text would not necessarily be presented for adoption but could simply be noted by the Committee as the next draft of the text emanating from this session of the Committee. The Rapporteur should also report on the outstanding policy issues identified by the drafting group. The report of the Rapporteur would be included in the report of current session. The Committee could then decide on the next steps with regard to the text, taking into account the content

- of the text as well as the report of the Rapporteur. The Chair pointed out that this procedure would not necessarily set a precedent for dealing with future reports of IWGs 2 and 3.
328. Following a number of interventions, the Chair clarified that the informal drafting group would meet outside plenary hours during lunch times and at night. The Chair would also give the Delegation of India the opportunity to make a drafting proposal on Article 3, as it had requested. He advised that the informal drafting group should not come with a longer text than the version.
329. The Delegation of Belgium, on behalf of the EU and its Member States, supported the Chair. However, it reminded the Committee that drafting work should also be done on the objectives and principles. This should not be forgotten.
330. The Chair noted the concerns of the Delegation of Belgium, on behalf of the EU and its Member States.
331. In addition to previous suggestions made on Article 3, the Delegation of India proposed to replace "IPLC" with "beneficiaries under Article 2" in Article B, alternative 1, and to add the word "collective" before the wording "right to authorize". It proposed to insert a subparagraph (a), which would read: "in respect of TCEs other than words, signs, names and symbol", followed by the list. It expressed support for the insertion of "distribution" to the list and proposed to add the word "and" after "distribution". Following that, the Delegation proposed the insertion of subparagraph (b), which would read: "in respect of TCEs, which are words, signs, names and symbols including derivatives thereof: (i) any use for commercial purposes, other than the traditional use; (ii) acquisition or exercise of IP rights; (iii) the offering for sale or sale of articles that are falsely represented as TCEs made by the beneficiaries defined under Article 2; and (iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute." The scope of protection was limited to a certain category of TCEs in which other categories seemed to have been left out.
332. Following the work of the informal drafting group, the Rapporteur (Ms. Kim Connely-Stone, New Zealand) presented the following Report to Committee [Note from Secretariat: The draft articles are annexed to this report as Annex II]:

"Introduction

1. Following the discussion of document WIPO/GRTKF/IC/17/9 in the plenary, an Open-Ended Drafting Group on TCEs ("the Drafting Group") was established to clean the text and submit it to the plenary. It was understood that the Drafting Group was not a decision-making body.
2. The Drafting Group worked on the in-session version of document WIPO/GRTKF/IC/17/9, dated 8 December at 1.00pm ("the document"). The document submitted to the plenary was entitled *Draft Articles of the Open-Ended Informal Drafting Group of IGC 17* (dated 9 December 2010, 8.10pm).
3. The tasks of the Drafting Group, as directed by the Chair of the Committee, were as follows: (a) attempt to reduce the number of options in each article; (b) remove non-controversial text where there was agreement, but not add text; (c) address an "indicative list of issues" (enclosed); and (d) identify outstanding policy issues.
4. The Drafting Group agreed that the following categories of text could be deleted across the document: (a) the names of the Member States or observers that had made proposals; (b) the proposals of observers that had not been supported by any Member State; and (c) the commentaries and questions from IWG 1.
5. The Drafting Group also agreed to remove the joint references to "traditional cultural expressions" and "expressions of folklore" that appeared throughout the document, on the basis that the terms were synonymous. The version of the document that was reported back from the Drafting Group therefore only referred to "traditional cultural expressions". A footnote was included to record the understanding that the terms were synonymous.
6. It was also agreed that references to "domestic" or "national" legislation should appear as "domestic/national" as there was no agreement on the most appropriate term.

7. The Drafting Group's document also contained the policy objectives and principles taken from document WIPO/GRTKF/IC/17/4, as requested by a number of delegations.
8. In its consideration of each article, the Drafting Group followed the following process:
 - a. Where Member States that had proposed amendments to the document during plenary withdrew their proposals, that text was deleted.
 - b. Where there was no support for particular options during the plenary, those options were deleted.
 - c. Where there was agreement, options or textual proposals that were put forward during the plenary were deleted. Where there was no consensus, those options and textual proposals remained in the document. That text was marked by underlining (to identify text that was proposed during the plenary) and brackets (to identify reservations made during the plenary).
 - d. Where there was consensus, minor amendments were made to the articles to provide a clearer structure, ensure coherence and improve the reading of the article in question.

Summary of the outstanding policy issues

9. The Drafting Group's discussions revealed that a number of difficult policy issues still had to be resolved. Some of the most difficult were as follows:
 - a. In Article 1, there was no agreement on the scope of protected TCEs and how they should be described.
 - b. In Article 2, there was no agreement on the scope of beneficiaries and the extent to which the instrument should extend beyond Indigenous peoples and local communities.
 - c. In Article 3, there was no agreement on the scope of protection, including whether there should be economic rights, and whether these rights should be qualified.
 - d. In Article 5, there was disagreement on the degree of flexibility Member States should have to determine appropriate exceptions, and whether specific exceptions should be included.
 - e. In Article 8, there was disagreement on whether to be prescriptive about sanctions or whether to provide domestic flexibility on that matter.

Article 1 – Subject Matter of Protection

10. The Drafting Group considered the following issues concerning the subject matter of protection:
 - a. Whether the definition of TCEs should include a list of examples or simply categories of TCEs (issue 2(a) in the indicative list of issues). There was no consensus to remove the examples that followed paragraph 1, so the examples remained in the document.
 - b. Whether the proposal from Mr. Augusto Makiese at IWG 1, consisting of a set of criteria for protected TCEs, could be merged with paragraph 2, where some Member States had proposed the addition of criteria (issue 2(b) in the indicative list of issues). There was no consensus on merging the proposals.
 - c. Whether the recommendations of the working group on Article 1, which considered the concerns raised by some delegations that "works of mas" were not encompassed in the definition of TCEs, could be supported. The recommendation of the working group was to insert the phrase "or a combination thereof" after "tangible or intangible" in the second line of paragraph 1; that proposal had also been made by the Delegation of the Islamic

Republic of Iran during the plenary. There was no consensus that this amendment addressed the “works of mas” issue.

- d. Whether the article could be condensed or clarified. Some minor changes were made including the removal of the reference to “gestures and body movements” in subparagraph 1(c), as it was covered by “expressions by action”. The addition of “sacred places” to subparagraph 1(c), by the Delegation of Mexico, was clarified to refer to rituals in sacred places.

11. In Article 1 there was no agreement on the scope of protected TCEs and how they should be described. Questions included:

- a. Whether the definition of TCEs should be based on general categories or should include lists;
- b. Whether the lists could be rationalized;
- c. How expressions such as “works of mas” should be dealt with; and
- d. Which terminology best captured the key elements of TCEs.

Article 2- Beneficiaries

12. The Drafting Group considered the definition of beneficiaries and the choice of terms to be used throughout the text (issue 3(a) in the indicative list of issues). This included consideration of the recommendation of the working group that had been formed to consider whether the term “nations” should be included in the definition of beneficiaries. The working group, in addressing the issue and the concern of some delegations about the situation where their TCEs may be held by the remaining individuals of a community, proposed the following definition of beneficiaries:

Beneficiaries are Indigenous peoples, local and cultural communities and the rightful holders in whom the custody and safeguarding of TCEs are entrusted or held in accordance with...

13. There was no consensus to adopt the definition proposed by the working group, and no consensus on the two options contained in Article 2. The document therefore retained the two options for the definition of beneficiaries.
14. The Drafting Group also considered whether it was possible to reduce the duplication between Articles 1 and 2 (issue 3(c) of the indicative list of issues). There was no consensus on that point and the articles remained separate.
15. The Delegation of Nigeria agreed that it could remove the brackets around the word “should,” and the Delegation of Australia removed its comment regarding the distribution of benefits, as that was a comment rather than a drafting proposal.
16. The scope of beneficiaries was one of the key outstanding policy issues. This was closely related to the scope of the proposed instrument and the extent to which it should extend beyond Indigenous peoples and local communities.

Article 3 – Scope of Protection

17. The Drafting Group considered whether the proposal made by the Delegation of New Zealand on the scope of protection, as amended by the plenary, could form the basis of future negotiations on Article 3 (issue 3(a) on the indicative list of issues). While there was interest from some delegations in using the proposal, others wanted to consider it further, and no consensus was reached.

18. The Drafting Group also considered if there was a preference between alternatives 1 and 2

(issue 3(b) from the indicative list of issues). There was no consensus on which option would prevail, or on the amendments that had been proposed to them. As a result, alternatives 1 and 2 were retained, and the “New Zealand” proposal became alternative 3.

19. In its discussion of alternative 3, the Drafting Group agreed that the references to “beneficiaries/indigenous peoples or cultural community, etc” in that alternative needed only refer to “beneficiaries” since Article 2 defined beneficiaries. However, a footnote was added to indicate that the definition of beneficiaries was still a matter to be settled. Similarly, it was agreed that it was not necessary to always make references to beneficiaries “under Article 2” as that was implied.
20. There was no agreement on the scope of protection. One of the key policy issues was whether there should be economic rights, and whether they should be qualified by the other articles in the document.

Article 4 – Management of Rights

21. The Drafting Group considered the two additions that had been proposed in the plenary (issue 4(a) in the indicative list of issues). These were paragraph 3, which proposed that competent authorities report to WIPO each year, and paragraph 4 (proposed by the representative of KEI and endorsed by the Delegation of the United States of America), which provided that the management of the financial aspects of rights should be transparent. In response to the question in the indicative list of issues, there was no agreement to delete either proposal, so both remained in the document to be discussed by the Committee at a later stage.
22. The outstanding policy issues included whether governments should be able to legislate or make decisions concerning the management of rights (for example through national authorities), whether to refer to prior informed consent or “approval and involvement”, and whether there should be reporting requirements for competent authorities.

Article 5 – Exceptions and Limitations

23. There was no clear preference for one particular option or agreement to delete any of the options. As a result all options remained in the document.
24. Some minor changes were made to Article 5 to improve flow and coherence. Those included changing “between communities” (in paragraph 1(a)) to “among communities,” removing the reference to “members of the IPLC” (in the same paragraph) because it was a duplication of the term “beneficiaries”. The reference to “normal” in paragraph 1(a) was deleted as it no-longer made sense given the additions and changes that had been made in the plenary.
25. The structure of the article was amended slightly, to make it clear that what had been paragraph 3 was an alternative to paragraph 2. That paragraph was clearly identified as an alternative.
26. The outstanding policy issues included the degree of flexibility Member States should have to determine appropriate exceptions, whether specific exceptions should be included, and the degree to which the concept of prior informed consent or “approval and involvement” of indigenous peoples and local communities should feature in the article.

Article 6 – Term of Protection

27. The Drafting Group considered the three options on the term of protection (issue 6(a) from the indicative list of issues). It was determined that as there was no support for option 1 during the plenary, it could be deleted. There was no consensus concerning options 2 or 3, so both options remained in the document (as options 1 and 2).

28. It was agreed that the questions from IWG 1 in Article 6 should be deleted.

29. The bracketed words “are concerned”, in option 2, were deleted as they were not needed.

30. The outstanding policy issues included whether the elements of the new option 1 in Article 6 made sense as a package (for example, are elements of the option contradictory?), and whether time limits should be imposed on the period of protection for moral and economic rights.

Article 7 – Formalities

31. Article 7 only had one option, with some additions made during the plenary. It was agreed that the second sentence concerning the possibility of maintaining registers should be deleted, on the basis that it was not necessary to specify that registers could be kept and on what basis, as the general principle concerning formalities was established in the first sentence.

32. The Drafting Group did not identify outstanding policy issues on the question of formalities.

Article 8 – Sanctions, Remedies and Exercise of Rights

33. Article 8 had three options on the issue of sanctions, remedies and rights, and two new proposals (concerning trans-boundary co-operation and alternative dispute resolution).

34. Of the three options on sanctions, it was agreed that option 2 should be deleted because there was no support for that option during the plenary. As a result there were only two options in the document prepared by the Drafting Group (one provided flexibility for States to determine appropriate sanctions based on domestic law, while the other was more prescriptive).

35. The text in square brackets in paragraph 4 of original option 3/new option 2 was deleted on the basis that it repeated text at the beginning of the paragraph. The delegation that had proposed the square brackets during the plenary agreed to that change.

36. The Drafting Group then considered the two new proposals in Article 8:

- a. On the question of whether trans-boundary co-operation should be dealt with in paragraph 4 of option 2 or a separate article (issue 9(a) from the indicative list of issues) it was determined that the matter could be dealt with in option 2.
- b. On the question of whether an article on dispute resolution should be added (issue 9(b) of the indicative list of issues) there was no consensus. That proposal remained on the table for further consideration at the next session of the Committee. A minor amendment was made to reflect that it was a proposal for an additional article, and not an option under Article 8.

Article 9 – Transitional Measures

37. Of the three options on transitional provisions, it was agreed that option 1 should be deleted because there was no support for it during the plenary. As a result there were only two options in the Drafting Group's text. One protected the existing rights of third parties, while the other provided for continuing uses by third parties to be brought into conformity with the provisions after a period of time.
38. Some minor restructuring of the article was also undertaken, to move paragraph 1 of the remaining two options to the beginning of the article, to show that it applied to both options and to clarify the differences between the options.
39. There was some discussion of paragraph 3 in option 3/new option 2, and whether that was a reference to the repatriation of TCEs rather than their protection, and, if so, whether that was a matter to be dealt with in transitional provisions or in an IP instrument. That was an outstanding policy issue to be addressed at future meetings of the Committee. There were also unresolved discussions about whether the references to "good faith" should appear.
40. The questions from IWG 1 were deleted.

Article 10 – Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion

41. There were three options in Article 10. It was agreed that option 3 should be deleted as there was no support for it in the plenary. As a result there were two options in the Drafting Group's text.
42. In option 2 the bracketed word "of" was removed as it was a typographical error.
43. There was some discussion about whether the text that had been added to option 1, which provided that TCEs should be protected without time limit for the safeguarding of the cultural heritage of indigenous peoples, should remain in Article 10. One possibility was to move it to Article 6 on the term of protection. If the focus of the additional text was not about the term of protection, but about safeguarding cultural heritage, the question was raised whether that matter belonged in an IP instrument. This issue remained to be considered at a future meeting of the Committee.

Article 11 – National Treatment

44. As that article was not controversial, it was not discussed by the Drafting Group. However one delegation did suggest that further work could be done by the Committee or the Secretariat on the question of eligible foreign beneficiaries.

Enclosure

Indicative List of Issues

1. General issue
 - a. Can the commentary of the discussion in IWG 1 be removed now?
2. Article 1

- a. Whether to include a list of examples, or simply categories of TCEs, or neither a list nor categories
- b. The criteria for protected TCEs: merging article 1(2) and the proposal from Mr. Augusto

3. Article 2

- a. Definition of “beneficiaries” and selection of term used to describe them throughout the text
 - i. use of term “nation” and its meaning + the inclusion of individuals?
- b. Whether to retain “traditional cultural expressions/expressions of folklore” throughout the text
- c. Reduce duplication between Articles 1 and 2

4. Article 3

- a. There seemed to be wide interest in the NZ proposal – can it, as amended in this session, form the basis of future negotiations on this article?
- b. If not the NZ proposal, which of alternative 1 or 2 should form the basis of future negotiations?

5. Article 4

- a. Which of the new articles 4.3 or 4.4 should remain?

6. Article 5

- a. Views on the US proposal in article 5.4

7. Article 6

- a. May Option 1 be deleted?
- b. May the questions in Article 6 be moved to the commentary or be removed altogether and included in the report of the session?

8. Article 7

- a. Only one draft article: perhaps no need to discuss at this stage?

9. Article 8

- a. Should transboundary cooperation be treated in a separate article? Can the South African text be the basis for future negotiation?
- b. Should an article on dispute resolution be added? Can the European Union proposal form the basis for future negotiation?

10. Article 9

- a. Can option 1 be deleted?
- b. Can the questions be transferred to the commentary part or to the report of the session?

11. Article 10

- a. Can option 3 be deleted?

12. Article 11

Only a draft article: perhaps no need to discuss at this stage?

[End of the Report]"

333. The Delegation of Angola, on behalf of the African Group, thanked participants in the drafting group for their contribution and for the flexibility that was shown.
334. The representatives of Tupaj Amaru and CISA regretted that the drafting group had deleted the proposals made by experts representing indigenous peoples on grounds that such proposals did not have support from the Member States.
335. The Chair stated there had been agreement on the ground rules that could not be changed at this stage. As the Chair, he assured that he would try his best to treat the indigenous communities as best as he could within the rules. The Chair proposed that the IGC take note of the text of the informal drafting group as presented and requested that it be attached to the report of current session. The Chair stated that the drafting group's text would be transmitted as a working document to the next IGC in May 2011. The Chair intimated that he would be willing to make the most of the time between the present and the next IGC session to hold informal consultations on the TCE text with a view to further streamlining and simplifying the text. He would aim to undertake, in consultation with Member States and accredited observers, an editorial exercise aimed at reducing the number of options and alternatives. He would not touch on policy questions which were for the IGC to negotiate. He could conduct such informal broad-based consultations without holding a physical meeting. An informal process could be done, for instance, by e-mail or any other electronic means. The Chair reiterated that the aim would be to try to further reduce the options and alternatives. The Chair stated that if he was able to produce a text, it would be transmitted, under his authority, as a "Chair's text" to the next IGC as an information document. The informal drafting group's text would not be superseded by the Chairman's text; the Chair's text would only be a reference for the IGC if it wished to consider it.

Decision on Agenda Item 6:

336. The Committee took note of the text of the draft articles on traditional cultural expressions prepared by the open-ended informal drafting group established by the Committee, based on WIPO/GRTKF/IC/17/9 as amended during the session, a copy of which text the Committee requested be added to the report of the present session of the Committee. The Committee requested that the text be made available as a working document for the Committee at its next session (May 9 to 13, 2011).

337. In addition, and with a view to further refining the draft articles and, in particular, reducing the number of options and alternative proposals, the Committee invited the Committee's Chair, with the assistance of his Vice-chairs, to undertake informal consultations with all delegations before the next session of the Committee and to prepare,

if possible, a further draft of the articles (a Chair's text) for consideration by the Committee, as it wishes, at its next session.

338. The Committee invited the Secretariat to prepare and make available, as an information document for the next session of the Committee, a glossary on intellectual property and traditional cultural expressions as recommended by the first Intersessional Working Group (IWG 1) in its Summary Report (WIPO/GRTKF/IC/17/8).

AGENDA ITEM 7: TRADITIONAL KNOWLEDGE

339. [Note from the Secretariat: In the discussion that took place under Agenda Item 7, drafting amendments were proposed to certain provisions contained in the Annex to document WIPO/GRTKF/IC/17/5. Delegations and observers also made comments and raised certain questions. The proposed drafting amendments, comments and questions are reflected in document WIPO/GRTKF/IC/18/5 Prov. The remainder of the report of the discussions that took place under this Agenda Item covers all other interventions made that did not directly propose an amendment or raise a specific question or comment related to the content of the Annex to document WIPO/GRTKF/IC/17/5.]
340. The Delegation of New Zealand made two general suggestions for the IWG on TK. The first remark was about the structure of the TK document. Comparing with the structure of the TCE document, it considered that the structure of the TCE document was much clearer and more logical. Thus, the IWG should not only review the TK document article by article, but should also think about structuring it. Secondly, there were some articles in common in the TK and TCE documents. Where the intent or the meaning of such articles was the same, it suggested that the language used also be the same. Otherwise they would be interpreted differently.
341. The Delegation of Norway had some comments regarding the relation between the process in the Committee and the Nagoya Protocol to the CBD. The Protocol provided an important step forward in achieving one of the objectives of the CBD, the fair and equitable sharing of the benefits arising out of the utilization of GR. That also would contribute to achieving the other two objectives: (1) the conservation of biological diversity, and (2) the sustainable use of its components. It also noted that the first review of the Protocol provision on compliance with domestic regulation or regulatory requirement of access and benefit sharing for TK associated with GR should assess the implementation in light of developments *inter alia* in WIPO. The Delegation considered that any national instrument agreed on under the auspices of WIPO and the CBD, in particular the Nagoya Protocol, was mutually supported. It highlighted that in particular the provisions on TK and on checkpoints in relation to GRs in the Nagoya Protocol could contribute significantly to the work of this Committee.
342. The Delegation of Australia supported the intervention made by the Delegation of New Zealand regarding the structure of document WIPO/GRTKF/IC/17/5. It believed that the TCE text drafted by IWG 1 provided a sound framework for the work in IWG 2.
343. The representative of the Secretariat of the CBD stated that a major accomplishment at COP 10 of direct relevance to the work of this Committee was the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, following six years of intense negotiations. The purpose of the Protocol was to effectively implement one of the three core objectives of the Convention, which was the fair and equitable sharing of benefits

arising out of the utilization of GRs. The Protocol built on the access and benefit-sharing provisions of the Convention. The core of the Protocol were obligations related to access to GRs, the fair and equitable sharing of benefits arising out of the use of GRs, as well as compliance with prior informed consent and mutually agreed terms. To support compliance, Parties had the obligation to take measures to monitor the utilization of GRs, including through the designation of checkpoints and reporting requirements. An internationally recognized certificate of compliance issued by the providers of GRs would be received as evidence that GRs had been accessed in accordance with prior informed consent and that mutually agreed terms had been established. The Protocol also contained significant provisions relating to TK associated with GRs, as well as relating to GRs held by indigenous and local communities, where the rights of those communities over those resources had been recognized. The Protocol set out clear obligations to seek the prior informed consent of indigenous and local communities in those situations. It also provided for the sharing of benefits arising from the use of TK associated with GRs, as well as benefits arising from the use of GRs in accordance with domestic legislation. Benefit-sharing had to be based on mutually agreed terms. Parties to the Protocol had to ensure that their nationals complied with the domestic legislation and regulatory requirements of provider countries related to access and benefit-sharing of TK associated with GRs. It should also be noted, as raised by the Delegate of Norway, that the decision of the COP contained a review clause related to developments in WIPO. To be more specific, four years after the entry into force of the Protocol, the COP serving as the meeting of the Parties to the Protocol was to undertake an evaluation of the effectiveness of the Protocol. In that context, the COP had decided that the implementation of the article related to compliance with domestic law on access and benefit-sharing for TK associated with GRs should be reviewed in light of developments in other international organizations, including WIPO. The article of the Protocol addressing the relationship with international agreements and instruments might also be of relevance to the work of the Committee. It referred to the possibility for Parties to develop and implement other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they were supportive of and did not run counter to the objectives of the Convention and the Protocol. Regarding Article 8(j), the COP had requested the Secretariat to continue its work on *sui generis* systems for the protection of TK. The Secretariat of the CBD had been requested to assist WIPO in completing its work on the development of the WIPO Toolkit on the documentation of TK. The COP had finalized the drafting of the “Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities relevant to the Conservation and Sustainable Use of Biological Diversity” and invited Parties and Governments to make use of the elements of the code of ethical conduct as a model to guide the development of models of codes of ethical conduct for research, access to, use, exchange and management of information concerning TK. The COP had also adopted a revised multi-year program of work for Article 8(j), including the initiation of new tasks related to the recently adopted Nagoya Protocol and its implementation, which included the development of guidelines for benefit-sharing and obtaining prior informed consent from indigenous and local communities, the identification of obligations of provider and user country, guidelines for the national implementation of 8(j) and related provisions, and standards and guidelines for the reporting and prevention of unlawful appropriation of TK and related GR. The COP had decided to initiate work on the development of guidelines for the repatriation of information, including cultural property. Another key achievement of COP 10 was the adoption of the new strategic plan for the next decade. The purpose of the strategic plan for 2011-2020 was to promote effective implementation of the Convention through a strategic approach, comprising a shared vision, a mission, and strategic goals and targets, that would inspire broad-based action by all Parties and stakeholders. The mission of the Strategic Plan was to take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems were resilient and continued to provide essential services, thereby securing the planet variety of life, and contributing to human well-being, and poverty eradication. Finally, she assured the full cooperation between the CBD Secretariat and the WIPO Secretariat.

344. The Delegation of Colombia welcomed the achievement by COP 10 on access and benefit-sharing of GRs.

345. The Delegation of Canada expected that the IWG's experts would provide more clarity on the whole structure of the text, as mentioned by the Delegations of Australia and New Zealand.
346. The Delegation of Algeria asked the Secretariat whether the WIPO Arbitration and Mediation Center was competent for examining disputes that might arise between the beneficiaries or between states as opposed to indigenous communities. It believed that the Center was only entitled to settle disputes arising from private parties, such as industry, not when states were involved.
347. The Secretariat answered that the WIPO Arbitration and Mediation Center had been established to deal with disputes, in particular between private parties. States could be parties if they were acting on the basis of private law. While the Secretariat had not been consulted on that specific dispute resolution mechanism proposed by the Delegation of the EU and its Member States, perhaps with a specific panel of neutrals, the Arbitration and Mediation Center could administer such disputes. But it was up to the Member States to decide and the Secretariat would not be able to decide. Without any such agreement, it would not be possible to submit such disputes to the Arbitration and Mediation Center.

Decision on Agenda Item 7:

348. The Committee requested the Secretariat to prepare a further draft of document WIPO/GRTKF/IC/17/5, reflecting, with attribution, the comments and proposals made during the seventeenth session, and to make such further draft available for the second Intersessional Working Group taking place from February 21 to 25, 2011 (IWG 2). The Secretariat was also invited to make structural changes to the document so as to align its structure more closely with that of the Committee's document on traditional cultural expressions as referred to above and to report on such structural changes in the further draft of document WIPO/GRTKF/IC/17/5.

349. The Committee invited the Secretariat to prepare and make available, as an information document for IWG 2, a glossary on intellectual property and traditional knowledge as recommended by the first Intersessional Working Group in its Summary Report (WIPO/GRTKF/IC/17/8).

AGENDA ITEM 8: GENETIC RESOURCES

350. The Delegation of Australia indicated that the objective of document WIPO/GRTKF/IC/17/7 was to try and distill and bring together all the relevant objectives and principles which could be used for developing further work of the Committee on GRs. It appreciated the comments received during the commenting process between the 16th and 17th session of the Committee, which appeared to be a positive indication. It highlighted that its new proposal contained in document WIPO/GRTKF/IC/17/11 was directly linked to document WIPO/GRTKF/IC/17/7.
351. The Delegation of Angola, on behalf of the African Group, introduced document WIPO/GRTKF/IC/17/10. This document aimed to work further towards a negotiating text on GRs in the Committee beyond a basic list of options and principles. It suggested the proposal as the basic text and foundation of the discussions adding that the proposal was open for comments from Member States in order to improve the document and to provide a solid foundation for discussions.

352. The Delegation of Australia welcomed the recent Nagoya Protocol. It shared the view expressed by others that the work of the Committee should be supportive of the CBD and should not run counter to its objectives. It highlighted the commitment of Australia as a mega-diverse country with a vibrant and living indigenous culture to make progress on GRs in the Committee and, in particular, to negotiations in good faith and in an open and transparent manner. This position had been reflected in its strong support for the African Group's position in relation to the renewal of the mandate and for progress of the work through IWGs. It believed that document WIPO/GRTKF/IC/17/10 provided a worthy contribution for consideration by Member States and an insight into the issues of particular interest to the members of the African Group. This clarity would help all experts in considering the intersection between the IP system and GRs at the upcoming IWG. It also appreciated the inclusion of objectives and principles as amended from document WIPO/GRTKF/IC/17/7. It noted that the proposal focused on disclosure and it strongly supported expert consideration of this mechanism, noting that disclosure in general was at the heart of the patent system. It indicated that it had circulated document WIPO/GRTKF/IC/17/11 to contribute and facilitate the discussion in the IWG. It believed that this document provided an approach that complemented the African Group proposal, while leaving it open for the IWG experts to consider all options in order to most effectively achieve the objectives shared by the Committee.
353. The Delegation of Brazil, on behalf of the DAG, fully supported the submission made by the African Group at the session. A first positive element of the African paper was that it had been tabled only after the adoption of the Nagoya Protocol by Member States Parties to the CBD and before the IWG. Another positive element of the African proposal was the suggested way forward. It stated that progress on GRs had been comparatively slow in the Committee as evidenced by the fact that the basis of work was still a revised list of options. The Delegation agreed with the African proposal as a starting point for text-based discussions including the proposals submitted by other Member States in previous sessions of the Committee in order to build on them, in particular that of the EU and Switzerland. A third and critical element of the African proposal was that it did not view the work of the Committee in isolation of developments taking place in other organizations, particularly at the CBD and at the WTO. It reiterated that the Committee had a mandate to undertake text-based negotiations with the objective of reaching an agreement on the text of an international legal instrument(s) to ensure the effective protection of GRs, TK and TCEs. It highlighted that, while WIPO had a very clear norm-setting role on IP, its role on GRs was far less clear. Protection of GRs was the subject matter of the CBD and, in the view of the DAG, WIPO should play a useful and complementary role to the work of WTO and the CBD, which should be instrumental for achieving the objectives of the CBD. It reminded that the Nagoya Protocol stated in Article 3*bis* that the work of the Committee should be mutually supportive and should not run counter to the objectives of the Convention and the Nagoya Protocol. In the same manner, discussions in this Committee should be without prejudice to the negotiations under way at the WTO on the mandatory disclosure proposal in the context of the implementation related issue of examining the relationship between the TRIPS Agreement and the CBD. The Nagoya Protocol set forth a series of measures intended to support compliance, as well as a system of internationally recognized certificates of compliance and the obligation of establishing checkpoints, in order to monitor utilization of GRs. WIPO's contribution to the protection of GRs should be targeted primarily at making the IP system help Member States comply with the provisions of the Nagoya Protocol. This approach was similar to the one that several like-minded countries were pursuing at the WTO in their proposal to amend the TRIPS Agreement. It considered that the African submission proposed useful amendments to the objectives and principles submitted by Australia, Canada, New Zealand, Norway and USA.
354. The Delegation of Belgium, on behalf of the EU and its Member States, reiterated its readiness to discuss the protection of GRs. It valued the importance of GRs in particular in relation to their contribution to innovative solutions to cope with challenges for food, health and environment. As indicated in previous sessions, it supported the compilation of an inventory of information resources on GRs, the extension of an online portal of registries and databases to include information systems on disclosed GRs, and the discussion on how existing search and examination procedures for patent applications could take account of disclosed GRs. It believed that these pragmatic measures would improve the exhaustiveness of patent information and contribute to the inclusion of relevant information related GRs into the patent granting process. It supported further work in all of these areas and underlined its preference for improving information systems on GRs for defensive protection through the extension of the online portal of registries and databases for access to information on

disclosed GRs and the implementation of an one-stop database system, which seemed to be the most practical and efficient approach for searching prior art. It reiterated that the EU had submitted a proposal concerning disclosure of origin of source of GRs and associated TK in document WIPO/GRTKF/IC/8/11. It wished to discuss its proposed document in the next IWG. It proposed to negotiate a text on the proposal detailed in document WIPO/GRTKF/IC/8/11 in the framework of a balanced outcome of the negotiations in the Committee. However, an acceptable definition of TK needed to be achieved prior to any agreement on TK associated with GRs within such an instrument. It welcomed a further examination of issues relating to disclosure requirements which existed already in many jurisdictions. In the above-mentioned proposal, it had supported and would still support a clearing-house mechanism. It was interested in discussing whether and how WIPO could take up this role. The Delegation considered that the discussion of WIPO's role in the clearing-house mechanism was particularly important at this stage as the negotiations on ABS had been concluded. It underlined the importance of avoiding any unnecessary duplication of functions between the CBD and WIPO, while ensuring that WIPO's particular expertise in the field of IP was deployed effectively. Guidelines and recommendations on disclosure or alternative mechanisms, and benefit-sharing mechanisms, could help to work out in practice the proposed mechanisms. It would be useful if the Secretariat could make a study on this issue and come up with flow charts to help further understand how the proposed mechanisms for disclosure might operate in practice. It stressed the need for implementation of the new mandate by the Committee handling all three items on an equal footing and reaching a balanced compromise on each agenda item.

355. The Delegation of Bangladesh, on behalf of the Asian Group, supported further progress on GRs. It believed that the recently concluded Nagoya Protocol had added further impetus on this work. It welcomed document WIPO/GRTKF/IC/17/7 and document WIPO/GRTKF/IC/17/10. The Asian Group members were ready to engage in constructive discussions on the basis of these two documents, as well as all the other relevant documents under consideration. This session of the Committee should give some clear guidelines to the upcoming IWG session in order to contextualize its work. In that respect, it felt that this session should aim at arriving at a set of objectives and principles which would help the IWG to build on. Accordingly, the Asian Group took note of some of the common elements in both aforementioned documents. It urged the Chair to direct the discussions towards having at least a single document containing a set of objectives and principles that could guide the work of the IWG. The Delegation expected that the IWG would try to make a text-based suggestion on GRs in line with the objectives and principles outlined in a single document emanating from the session of the Committee.
356. The Delegation of the Plurinational State of Bolivia expressed, as it had done in various other international fora such as the WTO, the UN General Assembly, the WHO or the Nagoya negotiations, its commitment to prevent capitalism from spreading into more essential areas of everyday life and into various aspects of environmental issues. The Delegation considered that it was mankind's greatest challenge to prevent this. It stated that nature was home and part of the overall cosmic setup and, therefore, nature was very valuable and not destined to put a price on. It rejected marketing of nature bringing an even greater imbalance into environment and running counter to its ethical principles. Privatizing and putting a price on life and nature was part of the IP system since the approval of Article 27.3 b of the TRIPS Agreement. This has led to increased biopiracy and plundering of GRs by making biological items marketable and allowing them to be privatized and then monopolized by a minority. This was alien to Bolivia's culture and its peoples, threatening peoples in the whole world, mankind itself and, in particular, indigenous peoples. It further stated that this issue was an obstacle to a more harmonious and balanced relationship between human beings and nature. The Constitution of the Plurinational State of Bolivia and many other Member States prohibited the obtaining of patents on nature and GRs. The Delegation quoted a section of Bolivia's constitution: "Negotiation, adoption and ratification of international treaties will be guided by the principles of harmony with nature, defensive protection of biodiversity and the prohibition of the private appropriation for use and exclusive exploitation of animals, plants, microorganisms or any other types of living material." The Committee should discuss the protection of GRs and policies which would protect from biopiracy by privatization and marketing of GRs. The heritage of peoples could not be privatized for the benefit of a minority. The best way of avoiding this was to make appropriation and exploitation in any part of the world impossible. It also referred to page 6 of Annex II of document WIPO/GRTKF/IC/17/6, which included the Bolivian initiative in the WTO to revise Article 27.3 b of the TRIPS Agreement prohibiting patents on plants, and microorganisms. However, this was not reflected

- in the list of options, which did not contain, therefore, all the elements required to continue the discussion on GRs. Therefore, the Delegation proposed to include in cluster A “Defensive protection of genetic resources” an option A.4 explicitly prohibiting patents on life forms and parts thereof. The text would read as follows: “Request that the Committee formulate legal provisions to amend international rules to prohibit the patenting of GRs and the private appropriation of all life forms and parts thereof.” The Delegation welcomed document WIPO/GRTKF/IC/17/7 as an important document for the continuation of work on GRs. However, it noted that it did not cover all of the concerns of the Plurinational State of Bolivia and other developing countries, as well as, particularly, indigenous peoples. It thanked the African Group and Australia *et altera* for their very important and valid proposals. It submitted written comments and hoped that the Bolivian position would be taken into account. It supported delegations which had expressed the view that these discussions should not compromise or prejudge the ongoing negotiations in other fora.
357. The Delegation of France, on behalf of Group B, welcomed the proposal of the African Group. It emphasized that the IWG did not have a negotiating mandate. Therefore, discussions among experts should be open and inclusive so as to consider all options and proposals on the table without any specific focus on one option or one document. With this understanding, the Delegation was looking forward to fruitful discussions among experts in the IWG.
358. The Delegation of Japan, as the host country to the CBD COP 10, highlighted the adoption of the Nagoya Protocol. With regard to document WIPO/GRTKF/IC/17/11, it believed that the paper was very useful and would contribute to further discussion in the IWG. It welcomed document WIPO/GRTKF/IC/17/10 and fully supported the statement made by the Delegation of France, on behalf of Group B, emphasizing that all issues on the table should be discussed. It stressed the importance of considering the issue of misappropriation of GRs by dividing it into two aspects, namely, the problem of erroneously granted patents and the problem of compliance related to ABS and PIC. As regards the problem of compliance, it hoped that the framework of the Nagoya Protocol would successfully function as provided in its relevant provisions. With the view to prevent erroneously granted patents, it reminded that it had proposed the establishment of a one-click database, which had obtained broad support from Member States. It reiterated its preparedness to engage in discussions towards the implementation of such a system.
359. The Delegation of the Bolivarian Republic of Venezuela supported the statement made by the Plurinational State of Bolivia and the text it had proposed. The Delegation highlighted that Article 24 of its Constitution, which was endorsed twice in less than 10 years by a popular referendum, prohibited patents on GRs. As it had said in Nagoya, it was strongly opposed to any form of privatization of GRs. It stated that sometimes the media misrepresented information, reporting, for instance, on the whole Nagoya process as being straightforward. On the contrary, the negotiations were very difficult and should necessarily continue at COP 11. Further, it noted that not all concerns raised by the Bolivarian Republic of Venezuela and other countries at the WTO calling for a revision of Article 27.3 b) of the TRIPS Agreement had been answered. It reiterated that the revision was supposed to be carried out within a four-year period but there were still a number of issues to be discussed and negotiated. It considered that certain people were trying to impose their institutions, norms and views on the rest of the world. It recalled that legal rights could not exist without an underlying moral principle. Any international agreement had to be based on moral principles and ethics. However, such moral principles depended on where peoples lived and how they lived. It indicated that it would be impossible for the political system and ethics of Venezuela to issue a patent or to market any kind of life form as an economic good.
360. The Delegation of USA thanked the Secretariat for its work before, during and after the meetings and its patient support, and the delegations that had submitted proposals and comments on this agenda item in particular, the Delegations of Chile, the Russian Federation and Colombia, as well as the NGOs that had submitted thoughtful comments on the proposal from Australia, Canada, New Zealand, Norway and USA contained in document WIPO/GRTKF/IC/17/7. Regarding document WIPO/GRTKF/IC/17/10, it supported the statement made by the Delegation of France, on behalf of Group B. No outcomes should be excluded or prejudged. It thanked the African Group for its proposal but raised concerns that it could prejudice an outcome. The new submission from Australia, Canada, New Zealand, Norway, Japan and USA was carefully prepared so as not to prejudice any conclusion. The Committee had not sufficiently formulated clear objectives and principles for the protection of GRs in the same style or to the same degree it had done on the two other substantive

agenda items. The purpose of the submission by Australia, Canada, New Zealand, Norway and USA at the last session of the Committee and of the new submission joined by Japan was to begin to establish a foundation of objectives and principles just as this Committee had done in the two other subject areas. It acknowledged the African Group's inclusion of these principles in the Annex to their document. This indicated a broad if not complete agreement of such objectives and principles as foundational to any work, as well as a needed prompt development. It also appreciated the comment made by the Asian Group that work of the IWG should not be narrowly directed. It stressed that no informed judgment could be made on the need or appropriateness of specific proposals regarding protection without agreement on broader objectives and principles. Therefore, the Committee needed to agree on the "what" and the "why" before getting to the "how". Reaching convergence on objectives and principles among the experts at the IWG would be a substantial and very important contribution to the work of the Committee. On this basis, it looked forward to engaging constructively in the discussion and providing experts to the IWG.

361. The Delegation of New Zealand supported the comments made by Australia concerning the way forward on GRs and the matters that should be considered by the IWG. It considered document WIPO/GRTKF/IC/17/7 as a sound basis for the discussion on the objectives of an international instrument on GRs. Document WIPO/GRTKF/IC/17/11 would assist the IWG to consider which of the options would be most useful in furthering the objectives under GRs. A key aspect of the IWG discussions would be consideration of disclosure. It agreed with others that WIPO was the appropriate forum to deal with this issue. As Australia, the Delegation considered that targeted expert discussion on the issues relating to disclosure requirements under option B.2 would draw out the issues relevant to other options on disclosure detailed in options B.1, B.3 and B.4. While it considered that mandatory disclosure was a matter to be discussed by the IWG on GRs, it thought that it would be premature to commence the negotiations on a mandatory disclosure requirement. The IWG should first consider the pros and cons of disclosure and the various technical issues that had been identified over the past few years, but which had not been properly examined. It supported the list of documents identified by the African Group as being relevant to the IWG's consideration of disclosure, in addition to the various technical and case study documents on the question of disclosure prepared by the Secretariat and the Committee since its inception. This included in particular the technical study on disclosure requirements prepared for the CBD. Regarding the options for further work, the Delegation suggested that the focus should be on projects that had been started but not yet completed. Therefore, it supported the list of tasks identified by the African Group in paragraph 6 of the document as a starting point.
362. The Delegation of Canada aligned itself with the statement made by the Delegation of France, on behalf of Group B, and with the statements made by the Delegation of Australia, when presenting documents WIPO/GRTKF/IC/17/7 and WIPO/GRTKF/IC/17/11. It thanked the African Group for its proposal and for its comments on the first submission by Australia, Canada, New Zealand, Norway and USA, as well as Chile, Colombia and the Russian Federation for providing written comments on that document in the intersessional commenting period. On the proposal made by the African Group, it stressed that, in Canada's view, the discussion of the Committee on GRs should first focus on objectives and principles and not on any specific options, so as not to prejudge the outcome of the discussions. It looked forward to the expert advice of the IWG and recalled that it did not have a mandate to negotiate, but would rather support and facilitate the negotiations of the Committee by providing legal and technical advice in line with the decision made at IGC 16. The Delegation stressed that the IWG should not focus on any option or on any limited set of options, but consider objectives and principles. To that end, the IWG should discuss in their original form the objectives and principles listed in document WIPO/GRTKF/IC/17/7. The most recent proposal in document WIPO/GRTKF/IC/17/11 might facilitate the work of the IWG as it linked the options presented by the Secretariat in document WIPO/GRTKF/IC/17/6 with the objectives and principles in document WIPO/GRTKF/IC/17/7.
363. The Delegation of Indonesia aligned itself with the statement made on behalf of the Asian Group and stated that the protection of GRs was an important and strategic issue which should be wisely discussed. It was of the opinion that the engagement in the debate should be in line with objectives and principles, with the mandate, as well as supportive of the IWG's efforts to be text-based, and with the CBD and the Nagoya Protocol. The Delegation stated that the Protocol was critical and relevant for the documents tabled. Regarding document WIPO/GRTKF/IC/17/6, it welcomed further careful discussions.

364. The Delegation of Mexico considered fundamental that the Committee and the IWG initiated discussions to establish whether the texts should be used as the basis for developing an international legal instrument on the effective protection of GRs or whether it might just be adequate to modify existing international instruments within WIPO. Given the adoption of the Nagoya Protocol, discussions should include an item on the relationship between the Nagoya Protocol and WIPO, in particular regarding articles 12 and 12 *bis* of the Protocol, on measures to ensure that the use of GRs and associated TK was in accordance with prior informed consent and that mutually agreed terms had been established, and regarding article 13 of the Protocol, on the issues of monitoring at the various stages of research, development, innovation, premarketing and marketing. It was important to analyze the options in document WIPO/GRTKF/IC/17/6 and the proposals in documents WIPO/GRTKF/IC/17/7 and WIPO/GRTKF/IC/17/10 together in order to achieve real and proper protection for GRs. It highlighted the fact that the work of the Committee should be directed, as its terms of reference indicated, at protecting GRs, but efforts should focus on the prevention of misappropriation and misuse through IP rights.
365. The Delegation of the Russian Federation thanked the initiatives of Member States to further proposals as reflected in documents WIPO/GRTKF/IC/17/10 and WIPO/GRTKF/IC/17/11, which it had not yet studied in detail. It supported the proposal contained in document WIPO/GRTKF/IC/17/7 from Australia, Norway, New Zealand and USA and all five objectives and correspondent principles set forth, in order to achieve the necessary outcomes. The document proposed five objectives together with principles which should be applied in order to achieve the corresponding objectives. All the objectives were interlinked and aimed at resolving issues relating to the protection of IP rights on conditions of fair and equitable sharing of benefits from the use of GRs. At the same time, the objectives and principles made provision for inventors using GRs and any associated TK to observe any conditions of access, use and fair benefit sharing (Objective 1), and they were also aimed at supporting the role of the IP system in promoting innovations (Objective 5). One of the most important conditions was constituted by the provisions of Objective 2, preventing patents being granted in error for inventions that were not novel or inventive in light of GRs and associated TK. Patent applicants should not receive a monopoly on inventions that were not novel or inventive. The logical consequence of observing this condition was the need to “ensure patent offices had available the information needed to make proper decisions on patent grant”, as stated in Objective 3. Therefore, the priority tasks in the Committee’s work was cluster A of document WIPO/GRTKF/IC/17/6, relating to the protection of GRs and including an analysis and broad recognition of other sources of information already disclosed on GRs, *i.e.* the compilation of a list of existing periodicals, databases and other information resources, which documented disclosed GRs. As already pointed out earlier in statements by Committee participants, an effective solution was the creation of a database of GRs and TK, which would be accessible for experts from any country, in order to avoid patents being granted in error for GRs and associated TK. An indisputable condition in the process of work on GRs should also be the “relationship with relevant international agreements and processes” in Objective 4, and the observance and compliance with other international and regional agreements and processes, in particular, the provisions of the CBD and the standards of the FAO. The importance of such cooperation had been pointed out on many occasions at Committee sessions.
366. The Delegation of South Africa extended its congratulations to the Government of Japan for successfully hosting the Nagoya negotiations. The Delegation stated that in a recent side event presentation at WIPO on December 7, 2010, the Centre for Economic and Social Aspects of Genomics (CESGAN), UK and the UN University, Institute of Advanced Studies (UNU-IAS) made an insightful observation on the strategic role of the issue of disclosure to the problem of the dysfunctional relationship between the CBD, WTO TRIPS and WIPO. The study highlighted the experiences of the Bayh-Dole Act and disclosure requirements in USA for federally funded research under the US Patent Act. The research had demonstrated that the disclosure requirements did not place an unnecessary burden on patent offices, researchers, inventors or regulatory bodies funding research. It had reviewed the existing possibilities for monitoring disclosure requirements without any due difficulty. The role of the disclosure requirements in building a global system that was transparent and trustworthy had also been noted. The study recommended that the adoption of common practices in disclosure requirements in patent applications would increase traceability of the commercialization of GRs for the benefits of stakeholders. This measure was likely to reduce the due diligence burden on entities seeking an economic interest in such patents. There was an emerging trend of more countries taking up disclosure requirements in their patent systems. It noted that of the 18 countries referred to,

which had amended their laws on disclosure requirements, the majority of those countries were European. It noted that South Africa had also taken measures in implementing the biodiversity regulations to include mandatory disclosure as part of the applications and permissions, through the amendment of the Patent Act in 2005. The South African Government had also established the National IP Management Office to manage the new Act on publicly funded research and IP rights arising thereof. The Delegation fully endorsed the African Group's proposal and its flexibility shown on the matters. The African Group's proposal had demonstrated willingness to be inclusive and pay attention to the perspectives and proposals from other countries. Referring to the study, it showed that enough research had been conducted and had given national experiences. The Delegation highlighted that it was not premature in any event for the Committee to engage in negotiations on GRs and TK. It noted the outcome of the Nagoya Protocol and the time that it had taken to reach those agreements. It explained that the proposal provided key options for further discussion and negotiations in the Committee in accordance with its mandate. It recalled that the Committee had a mandate for text-based negotiations and, however, some Member States were calling for discussions, contrary to the mandate and questioned the seriousness of commitment to abide with it. It called upon Member States to focus on the mandate and to show not only flexibility but foresight for the work of the Committee to go forward.

367. The Delegation of Switzerland welcomed substantive discussions on GRs over the last several meetings of the Committee. While continuing the discussions on GRs, the Committee should pay due regard to the latest developments in other international fora, particularly the adoption of the Nagoya Protocol. The Delegation had studied with interest several of the documents submitted for the present session. It was of the view that all of these documents were helpful for continuing discussions on GRs. The new documents, in addition to the previous documents, would serve as a good basis for the discussions in the upcoming IWG and the Committee. It noted that they included document WIPO/GRTKF/IC/10/11 containing Switzerland's proposal to WIPO on the disclosure of the source of GRs and TK in patent applications. The Delegation was looking forward to discuss this proposal together with all other proposals on GRs at the IWG. In the Delegation's view, a single approach would not allow for defensive protection of GRs, as the Committee was mandated to undertake text-based negotiations until the next General Assembly. It supported continued discussions on all three clusters contained in document WIPO/GRTKF/IC/17/6. As it considered all three clusters equally relevant, it saw no priority among these clusters. It thanked the delegations for submitting documents WIPO/GRTKF/IC/17/10 and WIPO/GRTKF/IC/17/11 as a helpful input to discussions on GRs. Contrary to what was stated in document WIPO/GRTKF/IC/17/10, it did not view the aforementioned proposals on the disclosure of source as the starting point for discussions on disclosure requirements in WIPO, but rather as a possible ending point. It would further study the documents and supported the statement by the Delegation of France, on behalf of Group B, on the IWG on GRs.
368. The Delegation of China noted that one objective in WIPO/GRTKF/IC/17/7 was to prevent patents being granted in error for inventions that were not novel or inventive in light of GRs and associated TK. It emphasized that disclosure requirements could further improve and perfect the existing IP system and enhance PIC and benefit-sharing. It hoped that the Committee could work more on disclosure requirements. The Delegation considered that there should be a text for the IWG to work effectively. It considered that the submission of the African Group could be the textual basis for the discussions in the IWG. Regarding Document WIPO/GRTKF/IC/17/11, it reserved its rights to make further comments.
369. The Delegation of Kenya stated that it had been a victim of biopiracy. It was a mega-diverse country, its biodiversity included snowcapped mountains, the Rift Valley, the delta and the fresh water lakes of Lake Victoria. It drew attention to document WIPO/GRTKF/IC/16/INF/25 that raised pertinent issues on the subject discussed in this Committee. Kenya's new Constitution promulgated in August 2010 had addressed this particular issue in Articles 11 and 69. On the statement made by the Delegation of the Plurinational State of Bolivia, it observed that the IP and patent system had been shown to be the international highway for misappropriation of GRs and TK so it would be prudent that the same highway had regulations to remedy this situation.
370. The Delegation of the Islamic Republic of Iran welcomed the comments listed in the African proposal. It stated that the document could be considered as a good basis to compile the sets of objectives and principles and to transmit it to the IWG session in order to guide its work. This exercise could be done here in plenary or in an informal format to provide tangible guidelines in the form of recommended

options on the way forward.

371. The Delegation of Namibia supported the Islamic Republic of Iran. It stated that it had coordinated the African Group in the negotiations of the Nagoya Protocol, which took six years. Three and a half years had essentially been wasted with gap analyses and discussions, before getting to negotiations along a structure that was agreeable for everyone. In its view, the African Group proposal was trying to achieve this by bringing together elements that had been put together by different parties and different interests. This proposal attempted to give guidance in order to structure the discussions in the IWG. The Delegation highlighted that no progress would be made without a structure. It proposed to set up a process in order to structure the basis of a document that could become the scaffolding for a negotiating process and provide structure and guidance to the discussions in the IWG.
372. The representative of CISA aligned himself with the statements made by the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela. He indicated that he would continue to object the process. WIPO was undertaking a process which was limiting indigenous peoples' ability to make proposals, to participate and to deny abusive international legislation as a result of such a process.
373. The Delegation of Senegal stated that the question of the protection of GRs was basically a question of survival for its country. GRs were not inexhaustible and, therefore, Senegal applied specific programmes on sustainable development and on the use of GRs. It announced that Senegal supported the Millennium Development Goals and that it had taken very positive initiatives at a local level to preserve resources. For example, the rainforest in Senegal played a very important role in maintaining and stabilizing ecosystems and in helping to fight against the increasing silt invasion of arable lands. As a member of the African Group, it expected to hear constructive proposals in order to make significant further progress. The Delegation welcomed the initiatives taken *inter alia* by Kenya and South Africa. African countries were increasingly introducing provisions into domestic law covering the protection of GRs. The Delegation was also grateful for the Asian proposal and for certain components of the proposal of the Delegation of Belgium, on behalf of the EU and its Member States.
374. The representative of Call of the Earth stated that GRs and biodiversity located on the lands of indigenous peoples had been maintained, conserved and preserved by those indigenous peoples as a source of their daily subsistence, for covering their basic food requirements, meeting their health needs, etc. GRs were closely related to indigenous peoples' TK and both had an intrinsic value for the communities. He stated that they could not be subject to marketing or industrial property laws because the underlying systems were unknown to indigenous peoples. Because of the lack of regulations protecting the rights of the indigenous peoples on their GRs and associated TK, biopiracy had been, and indeed continued to be, a cause of economic and moral loss for the countries of origin and for indigenous peoples. He urged to stop this harmful situation. Indigenous peoples had made huge contributions to food, security and food sovereignty worldwide and they had also provided resources for agro-chemical development and medical research. However, the IP system and, in particular, the patent system, were failing to recognize the efforts made by indigenous peoples. The disclosure of origin of GRs in patent applications should also include the original natural resources as a vital component of benefit-sharing with indigenous peoples who had preserved and continued to preserve GRs and biodiversity on their lands and their associated TK. Therefore, it was fundamental that these rights were acknowledged, including in this Committee, and that the well founded PIC of indigenous peoples and local communities was sought and obtained before such knowledge and resources were used.
375. The representative of ICC stressed that the issue of developing specific requirements for the disclosure in patent specifications was a topic well worth discussing in detail at the political and at the expert level. Like the Delegation of South Africa, he referred to the side event of December 7, 2010, which disclosed interesting, detailed and very valuable work. He considered this work would be a valuable basis for further discussion and commended its approach of rational discussion. Very valuable research had gone into the paper and made it clear that there was already an enormous amount of information in patent specifications available, including information on the origin of GRs and various conclusions might be drawn from this. He remarked that many GRs were listed as coming from several countries. For people dealing with GRs, it was not particularly surprising that GRs were widely distributed and not necessarily associated with one particular country any more, though they may have been originally. He added that the paper had used as a marker or parallel a specific requirement in the US patent law to disclose whether the US Government had financed research in

- patent specifications of resulting inventions. He saw some parallelism, but not in every sense. In the case of research financed by the government, the patent applicant would know very well if he had received funding for the research that had produced the invention. He emphasized that the nature of the disclosure requirement should be made absolutely clear. In this case, the following brief sentence was sufficient: "This research was funded by the Government who has rights." Talking about disclosure of origin, it was not at all clear what should be disclosed. The representative questioned whether the original country of origin had to be disclosed. The distinction between source and origin was another point which was emphasized by the representative. He considered it helpful to discuss the real difficulties. He also indicated that it was necessary to discuss the principles before discussing any text.
376. The Delegation of Angola, on behalf of the African Group, stressed that the Group was trying to focus the work of experts of the IWG on documents. It indicated that this should be done now, recalling that the mandate of the IWG was to try to discuss and solve some technical issues and propose textual recommendations. The document produced by the Committee on GRs was just a list of many options. However, tackling one issue of these options would make it very easy for the experts to concentrate on and to try to come up with a textual recommendation. It raised concerns that some members did not go through the African Group proposal and requested to put it on the screen, as there were many similarities with the proposal of Australia which could be identified.
377. The Delegation of Chile reiterated the importance of the Nagoya Protocol in setting the international conditions to allow WIPO to make progress on GRs in accordance with the mandate given to it by the General Assembly. It thanked those who put forward proposals, in particular Australia. Chile had made comments and observations on that proposal and would make further comments on the African proposal. On the work of the IWG, it believed that experts should use all of the documents that had been made available to the Committee including also appropriate international documentation in other fora on this topic.
378. The Delegation of Egypt stated that the Egyptian environment was full of unique microorganisms and organisms which were currently subject to deterioration and extinction because of a number of parameters and misappropriation. Egypt ratified in 1994 the CBD and established an African procedure for ABS of GRs. On a national legislative basis, Egypt was working on preserving and using GRs.
379. The representative of INBRAPI thanked the Secretariat for the basic document on this item, document WIPO/GRTKF/IC/17/6, reiterating that this issue was key to the survival of indigenous peoples and supported the statements made by the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela. At least in the view of the indigenous peoples of the world, it should not be possible to grant patents on life forms or for any parts thereof. She stressed that some of the best preserved areas of biodiversity were the areas in which indigenous peoples lived. She emphasized that the recently adopted Nagoya Protocol recognized rights of indigenous peoples over their knowledge and, for the first time, over GRs. Those GRs were present on indigenous territories and lands. The representative hoped that the Committee would also acknowledge these rights of the indigenous peoples over their GRs and supported other organizations representing indigenous peoples including CISA. She also supported statements by the Delegation of Mexico. The Committee and the IWG should take into account the issue of PIC granted by indigenous peoples, MATs established for access to and utilization of GRs, and disclosure requirements. The representative highlighted that the issue of GRs and TK in secondary sources, such as databases, was left out in the Nagoya Protocol. She recommended that this point be particularly considered by the Committee. She stressed the importance of existing international instruments dealing with this issue under the CBD and the Nagoya Protocol, and, in particular, Articles 18, 19 and 31 of the UNDRIP.
380. The Delegation of Norway commended Australia for its proposal in document WIPO/GRTKF/IC/17/11 and supported working on its basis in the IWG and in future sessions. It also welcomed the African Group proposal in document WIPO/GRTKF/IC/17/10, since it contributed by putting the various positions on the table. It supported the statement by the Delegation of France, on behalf of Group B, in this regard. Further, the Delegation sought clarification of a paragraph describing the Norwegian disclosure legislation in document WIPO/GRTKF/IC/17/6, pages 20 to 21 referring to paragraph 243 of the report in document WIPO/GRTKF/IC/16/8 Prov. 2. It indicated that it was wrongly stated that an application would not be further processed before the requirement is met. No such consequences were foreseen in the Norwegian Patent Act. The Delegation considered important to assist the CBD

and the Nagoya Protocol to further their objectives and believed that disclosure was an important component to this goal. It welcomed the adoption of the Nagoya Protocol. It expected to contribute in order to achieve mutual supportiveness with other international instruments and reiterated that Norway had proposed in the TRIPS Council and in the Committee an obligation under the TRIPS Agreement and other instruments to disclose the origin of GRs when applying for patent protection. This would ensure transparency, enforcement of rights of countries to their GRs and compliance with the CBD and the Nagoya Protocol. Furthermore, a disclosure requirement would ensure that novelty requirements were met in accordance with the objectives and principles of the patent system while increasing its credibility. An equivalent disclosure obligation should apply where the claimed invention related to TK even if it was not directly linked to GRs. The CBD and the Nagoya Protocol applied only to TK which was linked to GRs. However, a general obligation to disclose any TK upon which an invention was based would help to prevent patents from being wrongfully granted. Accordingly, the non-compliance with the obligation to disclose GRs and TK should be treated as a formal error. The application should not be processed until the required information had been submitted. Where appropriate, the application could eventually be rejected on that ground. If, however, the breach of the disclosure obligation was realized only after it had been granted it should not affect the validity of the patent, but rather be subject to appropriate sanctions outside the patent system, for example criminal or administrative penalties. If the applicant had acted in good faith, the fact that incorrect or incomplete information had been given might have no consequences at all. Holding post grant patent protection despite non-compliance with the disclosure obligation was important to avoid creating unnecessary uncertainty in the patent system. Revoking a patent as a consequence of non-compliance would not benefit those who consider themselves to be entitled to benefit-sharing. Once a patent was revoked there would be no exclusive rights from which benefits could be derived. However, a patent could be revoked if the substantive patent criteria had not been met. For example, if a patent did not differ from TK to the degree required to constitute a patent, the lack of inventive step constituted a reason for invalidity and not the breach of the disclosure obligation. In the Delegation's view, the main achievement of the disclosure requirement was to introduce transparency in order to support the provisions on PIC, benefit-sharing, monitoring of and compliance with the Nagoya Protocol.

381. The Delegation of Peru thanked the African Group and Australia *et al* for their proposals as a good basis for the discussions in the IWG. On the proposals of disclosure of origin, the Delegation supported multi-lateral and efficient disclosure requirements as the best way to deal with the international misappropriation of GRs and TK, since they would make it possible for all members to identify the country of origin when a patent application was made, and make it easier to ensure that PIC and benefit-sharing provisions were observed. Having implemented the Andean Community Decision 391 on GRs, the patent office in Peru had been dealing with applications which submitted access contracts on GRs, derived products and related TK. It considered the Nagoya Protocol as a major step forward in the fight against biopiracy and urged the Committee to continue along this road by drafting proposals and documents in order to address the concerns of all developing countries and others.
382. The Delegation of Singapore welcomed the discussions taking place during the Committee's sessions with respect to the issue of GRs. However, as it had just received the African and Australian proposals, it was not able to go into substantive discussions or develop positions on them at this point. With regard to the present discussions on the objectives and principles for the IWG, the Delegation suggested that the objectives and principles shall not predetermine any specific measures to be taken. Regarding the process of the IWG, the Delegation felt that the experts should take into account all the documents. The recently concluded Nagoya Protocol could be referred to for guidance in order to avoid duplication of its objectives or coverage of issues.
383. The representative of MBOSCUDA expressed that GRs were very important to indigenous people and supported the African proposal. He believed that the Committee should take into consideration all existing international instruments, as well as, in particular, the Nagoya Protocol, and Article 8 j of the CBD. He requested the Committee to consider mechanisms to support capacity building, specifically in Africa, in order to allow indigenous peoples to effectively participate in this process.
384. The Delegation of Ecuador considered very important the issue of disclosure of geographical origin and also its distinction from disclosure of the source. The issue of equitable benefit-sharing according to the Nagoya Protocol should also be taken into account. These issues were of major importance to

Ecuador. It recommended that, when establishing guidelines for the work of the IWG, sufficient flexibility was to be provided in order to ensure that the IWG could work productively.

385. The representative of Tupaj Amaru urged the Committee to refer to the CBD and to study GRs in light of the environmental and financial crises which threaten the survival of humanity. For the purposes of the CBD, the term GRs meant genetic material of actual or potential value. Genetic material was itself defined as any material of plant, animal, microbial or other origin containing functional units of heredity which allowed the transmission of characteristics from parent to offspring, from one generation to the next, by means of the permanent reproduction of such resources. He recalled that the western world and its powerful transnational companies continued to plunder and destroy biological resources. The CBD of 1992 recognized “the close and traditional dependence of many indigenous and local communities embodying lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.” Biological resources, GRs and TK were previously viewed as the intrinsic heritage of aboriginal nations and local communities, and were part of humanity’s common heritage. Therefore, the Committee should study genetic material not only in terms of the market economy but also the sustainable development for the survival of humanity. Owners of such resources had been stripped, without their PIC, of their land, resources, knowledge and living traditions, and had been deprived of the right to equitable sharing of the benefits derived from these resources. For this reason, the representative supported the delegations that proposed to regulate access to GRs and prohibit biopiracy at the national and international level.

Decision on Agenda Item 8:

386. *The Committee requested the Secretariat to make available copies of all relevant documents for the third Intersessional Working Group taking place from February 28 to March 4, 2011 (IWG 3), including: WIPO/GRTKF/IC/8/11, WIPO/GRTKF/IC/9/13, WIPO/GRTKF/IC/11/10, WIPO/GRTKF/IC/11/11, WIPO/GRTKF/IC/17/6, WIPO/GRTKF/IC/17/7, WIPO/GRTKF/IC/17/10, WIPO/GRTKF/IC/17/11, WIPO/GRTKF/IC/17/INF/10, WIPO/GRTKF/IC/17/INF/11, WIPO/GRTKF/IC/17/INF/12 and WIPO/GRTKF/IC/17/INF/13, as well as the WIPO Technical Study on Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge (WIPO publication No. 786).*

387. *The Committee invited Committee participants who want their comments considered by IWG 3 to provide written comments on all relevant working documents before January 14, 2011 and requested the Secretariat also to make those comments available for IWG 3.*

388. *The Committee suggested that IWG 3, in a flexible manner, devote adequate time to discuss both objectives and principles and options, with at least one day on objectives and principles and at least two days on*

options. The Committee also suggested that IWG 3 discuss objectives and principles first and options second.

389. The Committee suggested that IWG 3 prepare, taking into account all the documents and comments thereon referred to, a draft text of objectives and principles for intellectual property and genetic resources, as well as a draft list of options for future work by the Committee on intellectual property and genetic resources, including, to the extent possible, textual recommendations, and to transmit such draft text and draft list, with any textual recommendations, to the Committee for its next session.

AGENDA ITEM 9: ANY OTHER BUSINESS

[Note from Secretariat: There were no interventions under this item.]

AGENDA ITEM 10: CLOSING

390. The representative of FAIRA, on behalf of 16 other indigenous peoples' organizations, thanked all the participants for the positive contributions during the session, particularly where there had been understanding and support for the Indigenous peoples' rights and interests. The Chair was thanked for his attention to procedures that assisted their equitable participation in these meetings, and hoped to continue to build upon that participation in the future meetings all through the IWGs and IGCs. He was concerned that in discussions at that IGC, issues still continued with the lack of understanding of the international norms regarding the human rights of indigenous peoples, *i.e.*, norms concerning self-determination, including self-government or autonomy and the right to development; ownership of IP and GRs; participation in decision-making including the PIC principle and resolution and adjudication of disputes and conflicts where they existed. They were pleased that the Secretariat had been requested to prepare a glossary of terms, and expected that such a glossary would include these and other related terms with reference to the standards that were established in international law. For the representatives of indigenous peoples' to participate in the WIPO deliberations and related discussions at the international level, there must be capacity-building measures. Additionally, it was clear that the greater dialogue on GRs, TK and TCEs needed to occur at the regional and domestic levels. It was a presumption to claim that indigenous peoples' rights and interests were protected at the community level, and would be secured under domestic law once an international instrument was negotiated. He stated that delegations that came to these IGC and related meetings should be held accountable to their history and current actions, in relation to protection of indigenous peoples' TK and GRs. He asked that States consider the benefit of having appropriate representatives of indigenous peoples in their delegations, recalling that a number of States had used this approach for positive results in the CBD negotiations. In conclusion, he called upon the participants to donate generously to the WIPO Voluntary Fund.
391. Several delegations thanked the Chair for his leadership during the session and the Secretariat for its hard work and support, and expressed satisfaction with the results of the session.

392. Many delegations thanked outgoing regional coordinators and deputies for their valuable contribution to the work of the Committee. Also thanked was the rapporteur of the Open-Ended Informal Drafting Group, Ms. Kim Connolly-Stone of the Delegation of New Zealand.
393. The Delegation of Namibia noted that discussions, especially on the disclosure requirement, had a great impact on the IGC negotiations. It underscored the need for legal certainty, stating that the IGC needed to create a system that would provide legal certainty for the providers and users of GRs, and indigenous and local communities who were the holders of the associated TK. In view of the upcoming IWGs, it asked participants to reflect on the consequences of not having a disclosure requirement in the patent system, which in its opinion seemed to be a new concept in the IGC. If the patent system continued to provide a safe harbor for bio-pirates this would undermine the credibility of the IP system internationally. It would render the IP system less and less relevant to developing countries. Ultimately, this would undermine the great virtue of the IP system, of giving incentive and rewarding investment to innovation. It appealed to the participants to reflect on how an IP system that enhanced legal certainty taking into account the various interests, could be achieved.
394. The Chair thanked all the participants, his Vice Chairs, the Chair of IWG and the Secretariat for the meeting's success.

Decision on Agenda Item 10:

395. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7 and 8, on December 10, 2010. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated before February 18, 2011. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the next session of the Committee.

396. The Chair closed the meeting.

[Annexes follow]

LISTE DES PARTICIPANTS/

LIST OF PARTICIPANTS

I. ÉTATS/STATES

(dans l'ordre alphabétique des noms français des États)
(in the alphabetical order of the names in French of the States)

AFRIQUE DU SUD/SOUTH AFRICA

Jerry MATJILA, Ambassador, Permanent Representative, Permanent Mission, Geneva

Yonah Ngalaba SELETI, Chief Director, National Indigenous Knowledge Systems Office, Pretoria

Susana CHUNG (Miss), First Secretary, Foreign Affairs Department, Permanent Mission, Geneva

Tshihumbudza RAVHANDALALA (Miss), First Secretary, Permanent Mission, Geneva

ALGÉRIE/ALGERIA

Nadia MOKRANI BELMILI (Mme), directrice des Affaires juridiques et présidente du Conseil d'administration, Office national des droits d'auteur et des droits voisins (ONDA), Alger

Hayet MEHADJI, premier secrétaire, Mission permanente, Genève

ALLEMAGNE/GERMANY

Tilman Andreas BUETTNER, Federal Ministry of Justice, Berlin

Susanne REYES-KNOCHE (Mrs.), Program Officer, Programme Implementing the Biodiversity Convention, Eschborn

Heinjoerg HERRMANN, Counsellor, Permanent Mission, Geneva

ANGOLA

Makiese KINKELA AUGUSTO, Third Secretary, Permanent Mission, Geneva

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Abdulmuhsen ALJEED, Examiner, Intellectual Property Department, King Abdulaziz City for Science and Technology, Riyadh

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Norman BOWMAN, Principal Legal Officer, Attorney-General's Department, Canberra

Edwina LEWIS (Ms.), Assistant Director, International Policy Section, IP Australia, Canberra

Katherine WILLCOX (Ms.), Second Secretary, Permanent Mission, Geneva

AUTRICHE/AUSTRIA

Günter AUER, Adviser, Federal Ministry of Justice, Vienna

Maria KRENN (Mrs.), Patent Officer, Austrian Patent Office, Federal Ministry for Transport, Innovation and Technology, Vienna

AZERBAÏDJAN/AZERBAIJAN

Sara RUSTAMOVA (Ms.), Chief Advisor, State Committee on Standardization, Metrology and Patent, Baku

BANGLADESH

Md. Nazrul ISLAM, Counsellor, Permanent Mission, Geneva

Faiyaz Murshid KAZI, Counsellor, Permanent Mission, Geneva

BARBADE/BARBADOS

Heather CLARKE (Ms.), Registrar, Corporate Affairs and Intellectual Property Office (CAIPO), Saint Michael

Corlita BABB-SCHAEFER (Mrs.), Counsellor, Permanent Mission, Geneva

BELGIQUE/BELGIUM

Natacha LENAERTS (Mme), attaché, Service public fédéral, Office de la propriété intellectuelle, Bruxelles

Katrien VAN WOUWE (Mme), attaché, Affaires juridiques et internationales, Office de la propriété intellectuelle, Service public fédéral, économie, petites et moyennes entreprises, classes moyennes et énergie, Bruxelles

Jean DE LANNOY, deuxième secrétaire, Département des affaires étrangères, Mission permanente, Genève

Marc THUNUS, conseiller, Mission permanente, Genève

BOSNIE-HERZÉGOVINE/BOSNIA AND HERZEGOVINA

Emina KEČO-ISAKOVIĆ (Ms.), Ambassador, Permanent Representative, Permanent Mission, Geneva

Mihajlo SUŽNJEVIĆ, Counsellor, Permanent Mission, Geneva

BOLIVIE (ÉTAT PLURINATIONAL DE)/BOLIVIA (PLURINATIONAL STATE OF)

Luis Fernando ROSALES LOZADA, Primer Secretario, Misión Permanente, Ginebra

BOTSWANA

Charles MASOLE, Deputy Permanent Representative, Permanent Mission, Geneva

Boitshupo Maphoi KOMANYANE (Mrs.), First Secretary, Permanent Mission, Geneva

BRÉSIL/BRAZIL

Erika BORGES (Ms.), Patent Examiner, Biotechnology Division, National Institute of Industrial Property (INPI), Rio de Janeiro

Carla LEMOS (Ms.), Environment Analyst, Ministry of Environment, Brazilia

BULGARIE/BULGARIA

Galya LAZHOVSKA (Ms.), Junior Examiner, Patent Examination Department, Patent Office of the Republic of Bulgaria, Sofia

Vladimir YOSSFIFOV, Consultant, WIPO Issues, Permanent Mission, Geneva

Nadia KRASTEVA (Mrs.), Second Secretary, Permanent Mission, Geneva

BURKINA FASO

Sibdou Mireille SOUGOURI KABORÉ (Mme), attaché, Mission permanente, Genève

CAMEROUN/CAMEROON

Anatole Fabien Marie NKOU, ambassadeur, représentant permanent, Mission permanente, Genève

Francis NGANTHA, ministre conseiller, Mission permanente, Genève

Rachel-Claire OKANI (Mme), enseignante d'université, Faculté de droit, Université de Yaoundé II, Yaoundé

Aurélien ETEKI NKONGO, premier secrétaire, Mission permanente, Genève

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[Annex II follows]

**DRAFT ARTICLES OF THE OPEN-ENDED INFORMAL DRAFTING
GROUP OF IGC 17**

December 9, 2010, 8:10 PM

OBJECTIVES (to be discussed at a later stage)

The protection of traditional cultural expressions should aim to:

Recognize value

- (i) recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

- (ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

- (iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national/domestic and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation and misuse of traditional cultural expressions

- (iv) provide indigenous peoples and communities and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and [derivatives] [adaptations] therefrom, and [control] ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

- (v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions;

Support customary practices and community cooperation

- (vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;

Contribute to safeguarding traditional cultures

- (vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of indigenous peoples and communities and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

- (viii) reward and protect tradition-based creativity and innovation especially by

indigenous peoples and communities and traditional and other cultural communities;

Promote intellectual and artistic freedom, research and cultural exchange on equitable terms

- (ix) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities;

Contribute to cultural diversity

- (x) contribute to the promotion and protection of the diversity of cultural expressions;

Promote the [community] development of indigenous peoples and communities and traditional and other cultural communities and legitimate trading activities

- (xi) where so desired by [communities] indigenous peoples and communities and traditional and other cultural communities and their members, promote the use of traditional cultural expressions for [community based] the development of indigenous peoples and communities and traditional and other cultural communities, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;

Preclude unauthorized IP rights

- (xii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions and [derivatives] [adaptations] thereof;

Enhance certainty, transparency and mutual confidence

- (xiii) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance
- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities
- (h) Respect for customary use and transmission of traditional cultural expressions
- (i) Effectiveness and accessibility of measures for protection

ARTICLE 1

SUBJECT MATTER OF PROTECTION

1. "Traditional cultural expressions"¹ are any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from generation to generation], / tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2 including, but not limited to:
 - (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];
 - (b) [musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;]
 - (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
 - (d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms], and sacred places.

2. Protection [shall] should extend to any traditional cultural expression which is the [unique] / indicative / characteristic product of a people or community, including an indigenous people or local community and cultural communities or nations as defined in Article 2, and [belongs to] is used and developed by that people or community [as part of their cultural or social identity or heritage]. Protected traditional cultural expressions shall be:
 - (a) the products of [creative intellectual activity,] including communal creativity;
 - (b) indicative of [authenticity/being genuine] of the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and
 - (c) maintained, used or developed by nations, states, indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law / customary normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community.

3. The specific choice of terms to denote the protected subject matter should be determined at the national, regional, and sub-regional levels.

¹ "Traditional cultural expressions" and "expressions of folklore" are synonymous for the purposes of this text.

ARTICLE 2

BENEFICIARIES

Measures for the protection of traditional cultural expressions shall/should be for the benefit of the:

Option 1: Indigenous Peoples, communities² and nations, Local Communities and Cultural Communities [and individuals of those communities]

Option 2: Peoples and Communities, [for example] including Indigenous Peoples, Communities, Local Communities, Cultural Communities, and/or Nations, and individual groups and families and minorities.

[in whom the [custody, and] safeguarding of the traditional cultural expressions are [entrusted [or by whom they are held] presumed to be vested] in accordance with:]

[*Option 1:* the relevant national/domestic laws and/or practices

Option 2: their laws and/or practices, including customary law and community protocols]

[[and] or who maintain, control, use or develop the traditional cultural expressions as being [characteristic or genuine] indicative expressions of their cultural and social identity and cultural heritage. In case a traditional cultural expression is specific to a nation, the authority as determined by the national/domestic law.]

² Footnote explaining different layers of communities.

ARTICLE 3

SCOPE OF PROTECTION

Article A

Secret Traditional Cultural Expressions

In respect of protected traditional cultural expressions, which are kept secret by the beneficiaries / indigenous people [or] local or cultural community, or nation, that people [or] community or nation shall/should have the means, through adequate and effective [legal and practical] appropriate measures, to prevent any unauthorized fixation, disclosure, use, or other exploitation.

Alternative 1

Article B

Rights Secured for Other [Protected] Traditional Cultural Expressions

In respect of [protected] traditional cultural expressions, there shall be adequate and effective legal and practical measures to ensure that the relevant beneficiaries under Article 2 [IPLC] has the exclusive and inalienable collective right to authorize and prohibit the following:

a) in respect of traditional cultural expressions other than words, signs, names and symbols:

- i) fixation;
- ii) reproduction;
- iii) public performance;
- iv) translation or adaptation;
- v) making available or communicating to the public;
- vi) distribution;

and

b) in respect of traditional cultural expressions which are words, signs, names and symbols, including derivatives thereof:

- i) any use for commercial purposes, other than their traditional use;
- ii) acquisition or exercise of intellectual property rights;
- iii) the offering for sale or sale of articles that are falsely represented as traditional cultural expressions made by the beneficiaries as defined under Article 2;
- iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute.

[In the case where the unauthorized user of a protected traditional cultural expression made a [genuine good faith] proven effort to locate the beneficiary of these rights and did not, the beneficiary shall be entitled only to equitable remuneration or benefit-sharing, subject to the provisions of Article C [for the use already made and with authorization for the continued use].]

Article C

Attribution, Reputation, and Integrity

The beneficiaries / indigenous people [or] local community or nation shall have the right to be acknowledged to be the source of the protected traditional cultural expression except where omission is dictated by the manner of the use and to object to any distortion, mutilation or other modification of, or other derogatory action, including any false, confusing or misleading indications which, in relation to goods or services, suggest any endorsement by or linkage with such indigenous peoples, local communities and nations, / in relation to the said traditional cultural expression which would be prejudicial to the beneficiaries / indigenous people [or] local community's [or nation's] reputation or integrity.

Alternative 2

Article B

The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, [should] [shall] be safeguarded in a reasonable and balanced manner.

As regards the moral interests, the beneficiaries should have the right to be acknowledged to be the source of the traditional cultural expression unless this turns out to be impossible / except where omission is dictated by the manner of the use and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said traditional cultural expression, which would be prejudicial to the reputation or integrity of the traditional cultural expression.

Alternative 3

Adequate and effective [legal or practical] measures should be provided to:

- 1) prevent the [unauthorized fixation, disclosure, use or other exploitation] disclosure of secret traditional cultural expressions;
- 2) require the acknowledgement of beneficiaries³ as the custodians of their traditional cultural expressions unless this turns out to be impossible;
- 3) protect against the offensive use of traditional cultural expressions which would be prejudicial to the reputation of the beneficiaries or the integrity of traditional cultural expressions;
- 4) protect against the use of the non-authentic traditional cultural expressions in trade that suggests a connection that does not exist with beneficiaries; and
- 5) [where appropriate,] provide equitable remuneration to the beneficiaries for [[enable] ensure the beneficiaries shall have exclusive and inalienable collective rights to authorize] the following uses of traditional cultural expressions:
 - i. fixation
 - ii. reproduction

³ To be defined in Article 2.

- iii. public performance
- iv. translation or adaptation
- v. making available or communicating to the public

ARTICLE 4

COLLECTIVE MANAGEMENT OF RIGHTS

1. The collective management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. [The beneficiaries may authorize [or to] a [designated] national competent authority [(for example, regional, national, or local)] [acting at the request, and on behalf, of the beneficiaries], in accordance with the national/domestic law / their traditional decision-making and government process / international law. Where an authorization[s] is [are to be granted] given, [by] [the] a competent authority may:
 - (a) Grant licenses only after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their traditional decision-making and governance processes;
 - (b) Collect monetary or non-monetary benefits from the use of the traditional cultural expressions providing such benefits shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits;
 - (c) [such authorizations shall/should be granted to a user by the designated competent authority [only] after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their national/domestic procedure and their customary rights [traditional decision-making and governance processes]; and
 - (d) any monetary [or] and non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions shall/should be provided directly by the designated competent authority to the beneficiaries concerned or utilized [for their benefits] for the direct benefit of relevant beneficiaries and the preservation of traditional cultural expressions.]
2. Where so requested by and in consultation with the beneficiaries, [the] a competent authority [shall] may / should
 - (a) conduct awareness-raising, education, advice and guidance functions;
 - (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
 - (c) establish the criteria to determine any monetary or non-monetary benefits; and,
 - (d) provide assistance in any negotiations for the use of the traditional cultural expressions.
3. [The competent authority shall report to WIPO, each year, and in a transparent way, on the distribution of benefits arising from the use of traditional cultural expressions.]
4. [The management of the financial aspects of the rights should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries.]

ARTICLE 5

EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions should:
 - (a) Not restrict the creation, customary use, transmission, exchange [and development] of traditional cultural expressions within and among communities in [the traditional and customary context by the beneficiaries [as determined by customary laws and practices] consistent with domestic laws of the member states; and
 - (b) Extend only to utilization of traditional cultural expressions taking place [outside the membership of the beneficiary community or] outside traditional or customary context.
2. [It shall be a matter of national/domestic legislation in accordance with the Berne Convention and the WCT to provide exception and to permit the use of protected traditional cultural expressions in certain special cases, provided that such utilization does not conflict with the normal utilization of the traditional cultural expressions by the beneficiary and does not unreasonably prejudice the [legitimate interests of] the beneficiaries.]
2. Alt. Parties may adopt appropriate limitations or exceptions, provided that the use of traditional cultural expressions is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community.
3. Except for the protection of secret traditional cultural expressions against disclosure, to the extent that any act would be permitted under the national/domestic law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of traditional cultural expressions [, provided such exceptions to the protection of traditional cultural expressions are limited to certain special cases that do not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries.]
4. [Regardless of whether such acts are already permitted under paragraph 2 or not, the following acts should be permitted:
 - (a) The making of recordings and other reproductions of traditional cultural expressions for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes; and incidental uses; and
 - (b) the creation of an original work of authorship by the beneficiaries or in association with them inspired/borrowed by traditional cultural expressions.]

ARTICLE 6

TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,
2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.
3. Secret traditional cultural expressions shall continue to enjoy the protection given to disclosed traditional cultural expressions as long as they continue to meet the criteria for protection under Article 1.

Option 2

1. At least as regards the economic aspects of traditional cultural expressions, their protection should be limited in time.

ARTICLE 7

FORMALITIES

As a general principle, the protection of traditional cultural expressions shall not be subject to any formality.

ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Option 1

1. Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures [necessary] to ensure the application of this instrument.
2. Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent to further infringements.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

Option 2

1. Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions.
2. If a [designated competent authority] is appointed under Article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in Article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.
4. Where traditional cultural expressions are shared by different countries or by indigenous peoples and communities in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument.

Proposed Article 8 bis on Alternative Dispute Resolution

Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national/domestic law.⁴

⁴ Such as the WIPO Arbitration and Mediation Center.

ARTICLE 9

TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.

Option 1

2. The state should ensure the necessary measures to secure the rights, acknowledged by national/domestic law, already acquired by third parties.

Option 2

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall have the right to recover such traditional cultural expressions.

ARTICLE 10

RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF
PROTECTION, PRESERVATION AND PROMOTION

Option 1

Protection for a traditional cultural expression in accordance with [these provisions] this instrument [does not replace and] is complementary to protection and measures that apply to that expression and derivatives/adaptations thereof in accordance with international law under international intellectual property instruments as well as other relevant legal instruments and [programs] plans of action for the safeguarding, preservation, promotion of cultural heritage and the diversity of cultural expressions.

Despite what is stipulated in this option / anything to the contrary, traditional cultural expressions should be protected without time limit for the safeguard of the tangible and intangible cultural heritage of indigenous peoples.

Option 2

Protection under this instrument should leave intact and should in no way affect the protection provided for in international legal instruments on intellectual property rights. Consequently, no provision of this instrument may be interpreted as prejudicing such protection.

ARTICLE 11

NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national/domestic measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.

[End of Annex II and of document]